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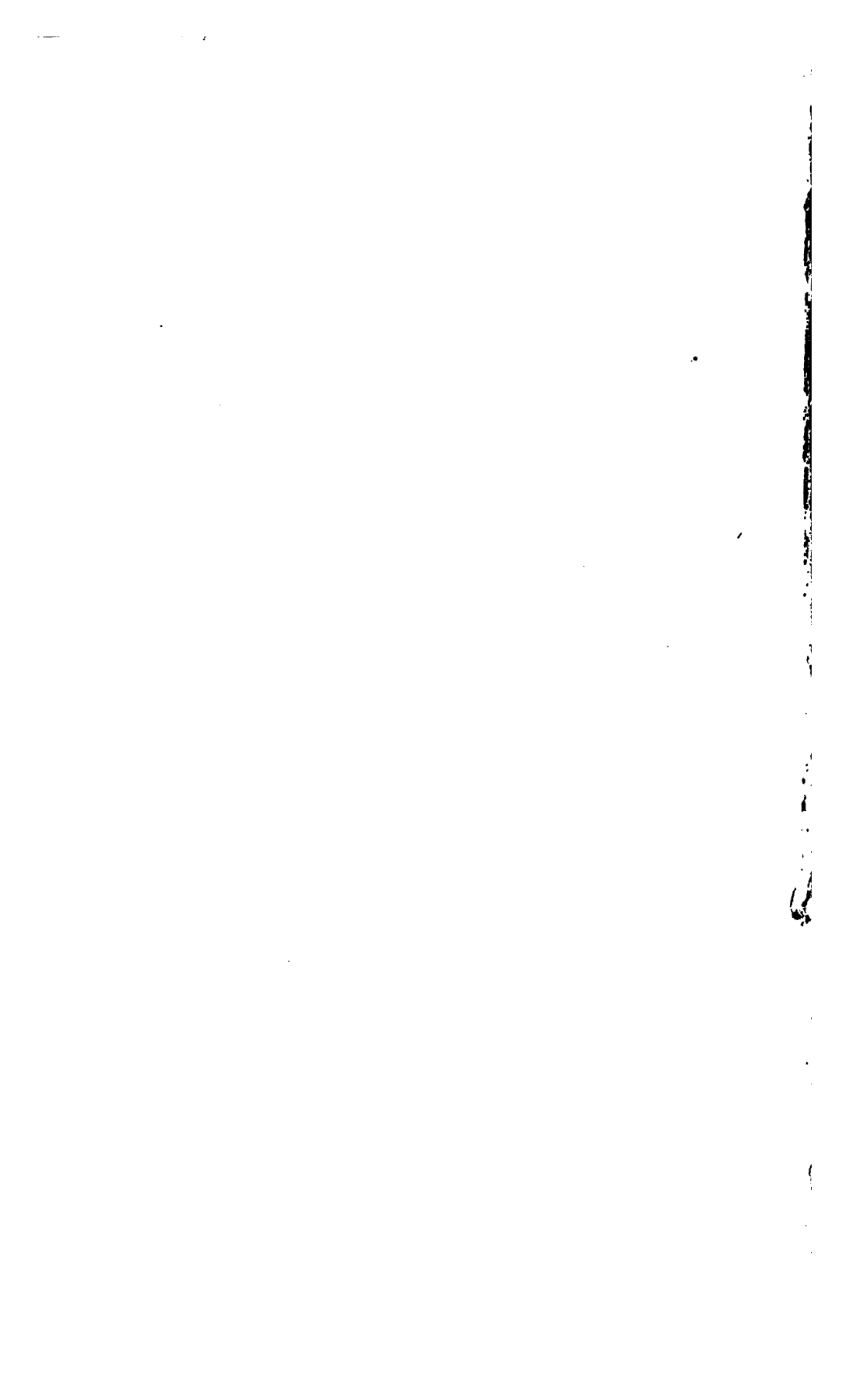




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*At Brit. Parliament, House of Lords*

# R E P O R T S

O F

Cases on Appeal from Scotland,

DECIDED

**In the House of Peers.**

VOLUME THE FIRST.

• CONTAINING THE PERIOD FROM THE UNION IN 1707,

TO THE

COMMENCEMENT OF THE REIGN OF GEORGE II.

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By DAVID ROBERTSON,

OF THE HON. SOCIETY OF THE MIDDLE TEMPLE.

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*JOHN LORD ELDON,*  
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THESE CASES  
ARE INSCRIBED,  
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AS A TESTIMONY OF HIGH RESPECT,

BY  
HIS LORDSHIP'S

MOST HUMBLE, AND

MOST OBEDIENT SERVANT,

DAVID ROBERTSON.





## P R E F A C E.

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**T**HE importance and utility of Collections of judicial Decisions are universally acknowledged.

In Scotland the Decisions of the Superior Courts of Common Law have received a proper degree of attention. Collections of Cases decided in the present Court of Session began to be formed at an early period after its institution, and these have been continued, though with various interruptions, till the present day. In matters of Criminal Law, the questions agitated in the Court of Justiciary have also in part been laid before the public.

Before the Union with England, little attention appears to have been paid in Scotland to the Judgments of their Parliament in Cases of Appeal; and since that period the decisions of the British House of Peers, in questions from Scotland, have been too much neglected.

In early times the Parliament of Scotland appears to have exercised an original Jurisdiction in civil causes\*: Whether or not there existed, in those times, an Appeal to the Parliament from the decisions of the other Courts then existing, is more obscure.—But a remedy of Complaint to the Parliament against those who exercised local jurisdiction appears to have been then known and practised.

\* Rymer, vol. i. par. 3. pp. 117. 120. Hague edit.

Soon after the return of James I. from his captivity in England, a remedy was applied to the many inconveniences, which must have resulted from the original Jurisdiction of the Parliament in Civil Causes. It was directed by an Act of the Legislature \* that Bills of Complaint should not be determined by the Parliament, but by the ordinary Judges of the Courts then in existence, the Justice, Chamberlain, Sheriffs, Baillies of Boroughs and Baronies, or the Spiritual Judges, with all of whom, it is to be presumed, that the Parliament before this period had a concurrent Jurisdiction. If these Judges refused to execute the Law *evenlie*, recourse might be had to the King, who was rigorously to punish the offenders as an example to others.

In the following year, under the auspices of the same sagacious Prince, the Court, termed *The Session*, was erected †, for the purpose of trying all questions that might be determined before the *King in his Council*. The Members of this Court, selected from the three Estates of Parliament, were to examine, conclude, and finally determine all questions brought before them. The Court of the *King in his Council*, mentioned in this Act of Parliament, appears to have had concurrent Jurisdiction with the Parliament, and Judges Ordinary, in civil Causes; and it now retained a concurrent Jurisdiction with the Court then established.

Afterwards the Parliament laid down certain regulations with regard to Appeals, or as they were then stiled *falsing of dooms*, and gave their authority to this species of legal remedy ‡. It was probably left ambiguous whether this falsing of dooms extended or not to the Judgments of *The Session*. To remedy this ambiguity, in the following reign, among other regulations made with

\* 1424. c. 45.

† 1425. c. 65.

‡ 1429. c. 116.

regard to the Administration of Justice, it was provided by the Legislature \* that the Causes coming before this Court should be *utterly* decided without any remedy of Appeal to the King, or to the Parliament. With regard to their Judgments therefore, no Appeal, or *falsing of doom*, was competent.

It is not necessary at present to examine minutely the different changes which subsequently took place in the Administration of Justice in Scotland, till the Supreme Civil Court was settled in its present form. In 1475, the Jurisdiction of *The Session* appears to have been abolished; and Parties were directed to pursue Justice, first before the Judges Ordinary; and a further remedy was given in the nature of an Appeal to the King and his Council †.

In 1503, a new Court, termed *The Daily Council*, was erected with the same powers which formerly belonged to *The Session* ‡. This Court remained till the Establishment of the present College of Justice; and the Legislature, when it established this new Court §, declared that its sentences should have the same strength, force, and effect, as the Decrees of the Lords of the Session had, while that Court was in existence.

In 1674, a violent contest arose between the Lords of Council and Session, and certain Members of the Faculty of Advocates, with regard to the competency of an Appeal brought to Parliament from a Decree of the Court. A Cause by the Earl of Dumfermline against the Earl of Callender and his son, Lord Almond, had excited much atten-

\* 1457. c. 62. † 1475. c. 62. and 1487. c. 105.

‡ 1503. c. 58.

§ In the common edition of the Statutes 1537. c. 36. In the edition known by the name of *The Black Acts*, 1532. c. 6.

tion, from what was considered a personal interference of the Duke of Lauderdale. Lord Almond, by the advice of Lockhart and Cuninghame, Advocates then much esteemed in their profession, presented an Appeal to Parliament against an Interlocutor pronounced in the Action. This matter was very warmly taken up by the Court; they declared that they found that no such Appeal had ever before been given in Writing; though in an Action between the Earls of Glencairn and Eglington in 1648, an Appeal had been made verbally, which had been acted on; and they stated as the ground of their opinion of the incompetency of an Appeal, that the Legislature had declared that no Appeal lay from the Judgments of *The Session*, and that the sentences of the Senators of the College of Justice should have the same force and effect which had been given to those of the former Court.

Pending the Discussions which arose upon this subject, another Appeal to Parliament was presented in the name of Lord Aboyne. The Judges, considering this matter of sufficient importance to require the interference of His Majesty, in a letter to Charles II., complaining of the Appeals which had been presented, stated that there appeared no vestige on record of any such Appeal since the Institution of the College of Justice, or before that period.

His Majesty took up this matter with increased warmth. In a letter to the Court he declared his dissatisfaction with, and *abhorrence* of these Appeals, and directed that special care should be taken to prevent them in future. He enjoined that no person connected with the College of Justice, nor any others, should advise, or in word or writing state any thing that expressed or imported the charging of the decrees of the Lords of Session with injustice, either in the way of Appeals or otherwise. If the Advocates who had advised the Appeals which had been presented refused to disown them, he commanded the  
the

the Court to debar them from the exercise of their profession in time coming.

The Advocates however refused to disclaim the Appeals, or to take an Oath which the Court had arbitrarily tendered to them to that effect. Being suspended from the exercise of their profession, many other Members of the Faculty of Advocates, adhering to the opinions of their brethren, withdrew along with them from the Court. Under the sanction of the Crown the refractory Advocates were afterwards banished from Edinburgh. This quarrel between the Judges and the Bar was not adjusted till after a considerable lapse of time; but the Advocates at last submitted to the opinion of the Court, and upon making their individual submissions, were received again to the exercise of their profession \*.

I have not discovered the grounds upon which the Advocates, in opposition to the Court, maintained their opinion. From the Acts of Parliament considerable doubts may be entertained; whether Appeals were then competent by Law. It appears, however, that the Appeal between the Earls of Glencairn and Eglington, was not the only one which had been presented to the Parliament since the Institution of the College of Justice. Another instance is mentioned in Balfour's Practicks in 1532 †, which seems to have passed without objection;

\* Acts of Sederunt, 1674.—Preface to Forbes's Decisions, p. 17. Even in England, the appellate jurisdiction of the House of Peers was not yet settled: keen disputes on this subject, between the two Houses of Parliament, occurred in 1675. Among other resolutions passed by the Commons, one was, "That there lies no appeal to the Judicature of the Lords in Parliament from Courts of Equity." *Lords and Commons Journals*, May and June 1675.

† Balfour's Practicks, p. 268. There appears to be no doubt that the date of the Institution of the College of Justice given in the Black Acts (1532) is more correct than that given in the common edition of the Statutes (1537). The authority of Balfour's Practicks coincides with that of the Black Acts upon this point.

and was considered as shewing the general competency of similar Appeals.

Of the expediency of allowing the Judgments of the Court to be reviewed in Parliament, and of the arbitrary nature of the proceedings against the Advocates, there appears to have been a very general conviction in the Country. This became manifest at the Revolution, when the Convention of Estates declared the Banishment of the Advocates to have been illegal, and asserted it to be the right of every subject "to protest for remeid of Law to the King and Parliament, against sentences pronounced by the Lords of Session, providing the same did not stop execution of those sentences \*."

I observe that a distinction, which seems hardly intelligible at present, was made at this period between Appeals and the Protestations for remeid of Law, which had now received the sanction of the Legislature. It is held by Lord Stair, that Appeals were still incompetent, but it is admitted that Protestations for remeid of Law were sometimes just and necessary. He seems still to have looked with an unfavorable eye on the licence given to these Protestations. He considered that till the King and Estates of Parliament should determine in what cases they might warrantably be used, and in what cases (as he says) they ought to be punished, it was necessary to use caution, lest the Lieges might ensnare themselves, "and become liable to *punishment for murmuring* against the Lords †."

From the Revolution till the time of the Union, various instances appear of Protestations for remeid of Law to the Parliament of Scotland. Several of them are mentioned by the Collectors of the Decisions of those

\* Act of Convention, 1689. c. 13.

† B. 4. tit. 1. § 56, &c. Some obscurity also seems to attend what his Lordship says of the features of those cases which were fit to be brought before Parliament for review.

times; and in some cases the Judgments of the Parliament are incidentally stated where the parties had occasion to return to the Court of Session\*. But those Judgments of the Parliament never were specially collected as Precedents, and are now perhaps to be consigned to oblivion. Indeed there is reason to suppose from the little authority given to private Acts of Parliament, that the judgments of the Parliament of Scotland in matters of Appeal, were not thought to be of much weight, further than to the parties interested. A learned Author observes, that the "Parliaments were at least far better constituted for settling general laws than for discussing the private rights of Parties†."

It was a point much agitated previous to the Union, in what manner Appeals from Scotland should be afterwards discussed; and a considerable degree of anxiety prevailed for the Laws and Customs of that Country, by allowing the Appeals to be carried to the Parliament of Great Britain‡. The fears however that were then entertained of an inundation of English Law through this channel have not been verified.

Previous to the Union, the Claim of Right had regulated the effect of a Protestation for remeid of Law, in as much as it had provided that this Protestation should not stop execution of the sentence of the Court below. But the House of Lords soon after the Union made an order with regard to Appeals from Scotland, which materially altered this enactment of the Scottish Legislature. It was declared, that after an order made to answer an Appeal, and the due intimation of such order to the Respondent, the sentence or decree appealed against from

\* Stair and Fountainhall's Decisions, *passim*.

† Dirlerton's Doubts, and Stewart's Answers, *voc. Parliament*, p. 218.

‡ Defoe's History—debates on this point.

such time ought not to be carried into execution by any Process whatever. It is not to be discovered from the Journals, whether the House, when this order was made, had under their consideration that article of the claim of right which had regulated this matter in Scotland \*. This order, though not particularly mentioned by our Text Writers, was probably the foundation of what they state to be the Law with regard to the effect of an Appeal to the House of Lords †.

Several instances of reversal having occurred, Appeals became so frequent, at an early period after the Union, that Lord Fountainhall complains that "they increased every year, to the great impoverishing and detriment of the Nation ‡."

They were still in Scotland stiled *Protestations for re-  
meid* of Law. In Appeals brought after the Union, the form previously used in Appeals from Courts of Equity in England had apparently been adopted: But the old

\* All that is known with regard to the order, or the occasion of its having been made, appears from an entry in the Journals of date the 19th of April 1709, of the following tenor: "The House having this day heard Counsel upon the Petition of Mr. George Mackenzie, son to George Mackenzie, Grantee from Her Majesty, in a Decree of Exchequer of North Britain, pronounced against Sir Alexander Brand, relating to his Appeal in this House, as also Counsel on the Petition of Sir Alexander Brand.

"The following order was made, viz.

"It is ordered by the Lords Spiritual and Temporal in Parliament assembled, 'That after an Appeal shall be received by this House from any sentence or decree given or pronounced in any Court in Scotland, and an order made by this House for the Respondent to answer the said Appeal, and notice of such order duly served on the Respondent, the sentence or decree so appealed against from such time, ought not to be carried into execution by any process whatever.'"

† Bankton, B. 4. tit. 1. § 61. Erskine, B. 4. tit. 3. § 2.

‡ Vol. 2. p. 734.

form



form of taking a Protest against the decision of the Court, and declaring the grounds of Appeal by an Instrument under the hand of a Notary Publick was continued for a considerable period after the Union. When the effect of an order of the House of Lords upon a Petition of Appeal came to be generally understood, the *Protestations for remeid of Law* were gradually discontinued, and for many years have been wholly left off\*.

Questions decided on Appeal, after the time of the Union, though they excited attention, do not seem at first to have been more regarded as precedents, than the Questions appealed in the Parliament of Scotland had before been. The great weight and authority, however, of the Judgments of the British House of Lords have been long received and acknowledged: but, while their decisions in particular instances have excited much attention, no collection of them has hitherto been given to the publick.

Various reasons might be assigned for the neglect of this valuable body of decisions. At first, the jealousy that was entertained by the Courts and by the Practitioners of the Law of Scotland, of the new appellate Jurisdiction, may be supposed to have prevented the decisions from being collected and treated with the respect which they deserved. The country, too, was much agitated with political questions of great magnitude, which soon after kindled a rebellion and civil war. In these turbulent periods, it is not probable that many of the

\* Proceedings in such Cases before the Parliament were regulated by 1695, c. 2. The form of a Protestation for remeid of Law may be seen in *The Art and Office of a Notary*, p. 302.

Appeal Cafes, which were printed for the House of Lords, found their way to Scotland; and in after times, more adapted for such pursuits, the difficulty of procuring a complete Collection of these Cafes may have been deemed to be an unsurmountable obstacle to the making a Report of them.

The Collections of printed Appeal Cafes, which go as far back as the Union, must necessarily be in the hands of but a few individuals; and probably, there is no instance where such a Collection is complete. For want of proper arrangement, these Cafes must also be of little use to the possessors of them; and the expence of procuring them is considerable. Having had access to a very full Collection of Appeal Cafes\*, I have for some years turned my attention to the practicability of giving to the Publick those Questions, relative to the Law of Scotland, which have been decided in the last resort. Having examined the Journals of the House of Lords to find what Appeals had come to a decision, and having inspected the Collections of Cafes in the Libraries of several publick bodies and individuals, it appeared that these Appeal Cafes have been preserved for the greatest part, and they have been hitherto found in all but a very few instances.

In the period to which my attention has hitherto been chiefly directed†, several reasons have appeared tending to render such a work desirable. Many Cafes have been appealed which are not to be found among the decisions of the Court of Session hitherto published. In sundry instances, also, where the Judgments of the Court of Session have been reversed in Parliament, the original de-

\* Belonging to John Spottiswoode, Esq.

† From the Union till the commencement of the reign of George II.

sions still remain as precedents (and these in some questions of much moment) in the Collections of decided Cases, in the Dictionary of Decisions, and in the works of the Law Writers of authority. The instances where such reversals are properly stated, in this period, are so few as only to form exceptions to the general practice. Some Cases also have occurred, where it appears from the Dictionary and the books of authority, that the Judgments of the Court below had been given in a certain way; whereas in fact such Judgments were merely interlocutory, and were afterwards altered by the Court, and the latter Judgments affirmed upon Appeal.

In the Questions here collected, there is a degree of certainty that the whole of the Matter at issue is before the Reader; but in the Collections of the Decisions of the Court of Session, during the period before-mentioned, the Judgments reported are often Interlocutors pronounced upon separate points of a Cause, the rest of which is sometimes not to be found in such Collections. In general in the printed Decisions of the Court of Session, during that period, there is little certainty, that the Judgment reported, was either the final Decision in the Cause, or that such Judgment was not brought before a Court of Appeal.

By mentioning these particulars, it is not intended to bring into question the accuracy or authority of Lord Kaimes, and other learned men, whose labours have tended so much to benefit the Science of the Law of Scotland. They shew, however, that this branch of legal Decisions, surely a most important one, has not been sufficiently attended to by these writers.

After a good deal of consideration as to the shape in which the Cases on Appeal should be given, it has been  
resolved

resolved to adopt the following arrangement : To give a Statement of the circumstances involving each Case, and of the proceedings leading to the Interlocutors appealed from ; to give these Interlocutors, with their dates, as correctly as they can be learned from the original Cases \* ; and to ascertain from the Journals of the House of Lords, where this can be done, what Interlocutors were appealed from in every cause, with their dates : if the Case depends upon Matter of Argument in Law, or of Construction, to give the heads of such Argument : where it depends upon disputed Facts, it has been considered unnecessary, in most instances, to detail these disputed Facts ; the Judgment is then given as stated in the Journals. This arrangement has only been varied, where reasons appeared requiring such alteration. On the margin are given References to the printed Collections of Decisions, in which particular Cases are reported, with a short Abstract of each Case. At the end of each Number, the Names of the Counsel, which appear at the original Cases, are stated, and such other observations are added as have occurred upon that particular Case.

A good many Cases in the present Volume relate to questions arising out of Forfeitures incurred for High Treason. A learned Reporter of Decisions in Scotland mentions † that he had omitted almost all the Cases of Treason, in the hope (among other reasons) that there would not at least for ages be occasion to consult them. I have ventured to think a different course more expedient with regard to cases of this nature. Many of these Cases are curious in themselves, and it is not in their direct appli-

\* In the Interlocutors, the terms *Appellant* and *Respondent* have been generally used, more easily to mark the Parties. This is commonly done in the early Appeal Cases.

† Preface to Macleaurin's Criminal Cases, p. 4.

cation only that they may be useful. The course of events has happily done away the grounds of delicacy upon such subjects.

At one time it was intended to have given these Reports in a more detailed form: but upon further Reflection this has been deemed to be inexpedient. During the period to which attention has hitherto been chiefly directed, few Cases have occurred from which some important deduction in Law or in Practice may not be formed.

It may be objected that the *ratio decidendi* must often be unknown or obscure in these Reports; but the same objection may be made to most of the Reports of Decisions in Scotland during this period. The Interlocutors appealed from frequently contain information as to the ground of Decision; and it is the present object to state with distinctness how the Court of Appeal has dealt with the Interlocutors pronounced by the inferior Courts under certain circumstances. This has now been unknown for more than a century; and it is conceived to be an object of considerable Importance to obtain so much, where probably little more can now be obtained.

BACKVILLE-STREET,  
November 1807.

**In page 61. *for* No. 9. *read* No. 11.**

**75. *for* No. 5. *read* No. 6.**

**120. *for* arguments, *read* agreements.**

**324. *for* the fiar, *read* the father.**

**337. *for* vassal, *read* superior.**

## REPORTS OF CASES

Fountain-  
hall, 22d  
and 31st  
July 1708.

**Sir James Gray, Baronet,**                 -                 *- Appellant;*  
**James Duke of Hamilton, Charles Earl of**  
**Selkirk, and Captain Alexander Gavin,**                 *Respondents.*

10th *March* 1708-9.

**Foreign Deeds.**—An assignment of a bond, (both being executed in England and in the English form) intimated by letter only, is preferable to a posterior ~~assignment~~.

The judgment, finding that the law of Scotland should regulate this case, is reversed.

**Holograph letters.**—The Court having refused to allow holograph letters to be equivalent to an intimation—judgment also reversed.

**I**N 1703 the Duke of Hamilton having borrowed 1000*l*. from Captain Gavin at London, he there granted Gavin his bond in the English form for re-payment of that sum with interest.

Gavin being indebted to Sir James Gray, the appellant, who was then also in London, he in July 1704, assigned the said bond to Sir James; and the assignment was executed in England, and in the English form. No formal intimation of this assignment was made to the Duke of Hamilton according to the mode practised in Scotland, but Sir James, on the 7th of September 1705, gave the duke notice of it by letter, and he received an answer from his grace, in his own hand-writing, bearing date the 22d of the same month, acknowledging that he had notice of the assignment, promising payment to Sir James of principal and interest, and desiring not to be pressed till he was in a condition to pay: and Sir James received another letter from the duke of a similar nature, also written by his grace himself, and bearing date the 5th of April 1706.

The respondent, the Earl of Selkirk, brother of the Duke of Hamilton (a), to whom Captain Gavin was also indebted in a large

(a) They were both sons of Lady Ann Hamilton and William Earl of Selkirk afterwards Duke of Hamilton.

sum of money, having got notice of the duke's debt to Gavin, and the assignment thereof, on the 14th of June 1706, laid arrestments in Scotland in the hands of his grace and Sir James Gray towards satisfaction of his own debt. But Sir James, notwithstanding these arrestments, on the 31st of March 1707, procured a new bond from the duke to himself corroborating the former, and for payment of the 1000*l.* by instalments; and he at same time granted the duke a counter obligation, that he would procure a decree of the court of session for the duke's payment of the money to him, and to keep his grace harmless from the arrestment. All the parties in these transactions were Scotsmen.

Sir James having brought an action before the court of session against the Duke of Hamilton for payment of the money to him accordingly, the Earl of Selkirk appeared for his interest, insisting that his arrestment was preferable to Sir James's assignment, which had not been legally intimated. Sir James contended, that the law of England, which did not require a formal intimation, ought to regulate this case; and, further, that the duke's letters were equivalent to an intimation.

After sundry proceedings in this cause, the Lord Ordinary found, that the duke's letters were equivalent to an intimation, and that the dates thereof were prior to the earl's arrestment, and therefore preferred Sir James Gray, and decerned.

But the respondent having brought the Lord Ordinary's judgment under review, the court by interlocutor on the 22d of July 1708, found "that Sir James Gray having made his election to prosecute his action before a Scots judicature, had submitted it to the law of Scotland, which requires an assignment to be intimated in a particular manner prescribed as essential to complete the right of the assignee, and makes all assignments void where there is the least variation from this form, and that the duke's private letters could not supply the defect of such legal intimation, nor be admitted to invert the order of preferring creditors established by law, especially in prejudice of a third party acting by law, and under a legal assignment, viz. an arrestment, which being executed according to the Scots law is equal to an assignment in writing, and therefore decerned the Duke of Hamilton to pay the money to the Earl of Selkirk, and assailed the duke from the process at the instance of Sir James Gray."

The appellant reclaimed, and prayed the court to grant him a commission for proving the time of his having received the duke's letters: but on the 31st of July 1708, the court "refused to grant the appellant a commission as desired in the petition, adhered to their former interlocutor, and ordained the same to be extracted."

Entered, 14  
Dec. 1708.

The appeal was brought from "a sentence or decree of the Lords of Council and Session on the behalf of Charles Earl of Selkirk, and the affirmance thereof the 31st July 1708."



*Heads of the Appellant's Argument.*

The matters in question having been transacted in England, and the bond and assignment being in the English form, the law of England, by which intimation of an assignment as done in this case by letter would be sufficient, ought to rule this case. By the law of nations, bonds and other personal contracts may be sued upon *ubique*, and are to be determined on according to the custom of the place where they are entered into. It was so determined by the House of Peers in the case of *Foubert v. Turst*, 11th December 1703, and by the Court of Session in the case of the *Master of Saltoun*, Stair, 5th July 1673.

It ought not to be presumed that the duke's letters, objected to as not probative, would be antedated by a person of his grace's honour and quality, to defraud his own brother: if the Court of Session had thought this possible, they ought to have allowed a proof of the time of receiving those letters.

*Heads of the Respondents' Argument.*

By the law of Scotland an assignment ought to be intimated to the debtor, in the manner prescribed by the act of the Scots parliament 1681, c. 5.; in default thereof the assignment is void against a third party; and an arrestment used before making such requisite intimation, is equal by the law of Scotland to an assignment legally intimated.

After hearing counsel, *It is ordered and adjudged, that the sentence or decree, and the affirmation thereof, complained of in the petition and appeal of Sir James Gray, be reversed: and it is further ordered, that the 1000l. and interest secured by the said bond be paid to Sir James Gray the appellant; and the said James Duke of Hamilton is to pay to Sir James Gray the 1000l., and interest thereon due accordingly, and for so doing shall be and is hereby indemnified.*

Judgment,  
10 March  
1703-9.

For Appellant,	<i>J. Jekyll.</i>	<i>Sim. Harcourt.</i>
For Respondents,	<i>John Pratt.</i>	<i>Dugal Stuart.</i>

The decision of the Court of Session, here reversed, is stated as an existing case in the Dictionary of Decisions, vol. i. *Voce Foreign*, p. 318.; and vol. ii. *Voce Proof*, p. 258.; and in Erskine, book 3. tit. 2. § 22. 42.

The case of *Foubert* and *Turst*, referred to by the appellants, being on a point of general law, may be briefly stated.

By articles of marriage executed at Paris, between Foubert and his wife, it was covenanted that two-thirds of 1200 livres should be settled as an estate to descend to the wife and her heirs, and that the goods of the husband and wife should be in communion, and be distributed according to the custom of Paris. These persons,

*Foubert &  
Turst* in the  
House of  
Lords, 11  
Dec. 1703.

being protestants, settled in England after the revocation of the edict of Nantes, where the wife died without issue.

Her representatives filed a bill in the Court of Chancery in England against the husband, claiming the two-thirds of the 1200 livres settled upon the wife and her heirs, and also a moiety of the goods in communion according to the custom of Paris. The Lord Keeper in Michaelmas term 1702 decreed, that these two-thirds of 1200 livres should be paid to the plaintiffs, but that the husband and wife having left France, and settled in England, their goods in communion were not to be distributed according to the custom of Paris, notwithstanding the covenant in the marriage articles. But the representatives of the wife having brought their appeal against the latter part of the decree, in regard to the distributions by the custom of Paris, the same was reversed by the House of Lords.

*Lasbley v. Hog*, in the House of Lords, 16 July 1804.

In the important case of *Lasbley v. Hog* in the House of Lords, in a speech previous to the decision by Lord Chancellor Eldon, this case of Foubert and Turst was stated; his lordship considered the reversal as having been founded in the *contract*, and that if there had been no contract, the law of England would have regulated the rights of the husband and wife, who were domiciliated in England, at the dissolution of the marriage.

#### Case 2.

Fountainhall, 26 July 1706, 12 July 1709.

Rose Muirhead, the Widow of James Muirhead the younger, of Bradisholm, deceased, - *Appellant*;  
James Muirhead of Bradisholm, - - - *Respondent*.

14th March 1708-9.

*Donatio non presumitur*.—A disposition by a father to his son, (followed by a *saîne*, which was not registered) made to preserve the estate from penalties of a test act, might be warrantably cancelled.

*Qualified oath*.—An oath received, though objected to as containing qualities.

THE late James Muirhead, the respondent's eldest son, in 1697 married the appellant an Englishwoman at London; and the parties in the present appeal severally allege, that deceit was used with respect to the fortunes of the husband and wife on that occasion. In September 1700, three years after the marriage, articles of agreement were entered into in the English form, whereby the husband covenanted to settle lands in Scotland of the annual value of 250*l*. for his wife's jointure; or to leave her at his death 2000*l*. personal estate, and 2000*l*. more to the issue of the marriage. He afterwards brought his wife to Scotland, where they both for some time resided with the respondent.

But misunderstandings arising in the family, the son brought an action before the Court of Session against the respondent his father for exhibition of a disposition of the lands of Bradisholm, which

which had been executed by the father in favour of the son, and of a sasine taken thereon; and for declaring the son's right to the estate in consequence of these titles. Soon after the commencement of this action James Muirhead the younger died, leaving issue of the said marriage a daughter, and the appellant his widow pregnant with a son, who died in a short while after his birth.

About six months before the husband died, he executed a holograph deed in the appellant's favour, and thereby "surrogated, substituted, and appointed the appellant, and gave to her his full right to all and every thing he had or could have had if living, as fully and amply in all manner of respects as if every thing were there set down at large;" and he appointed the appellant his sole executrix.

After her husband's death, the appellant re-commenced the action of exhibition and declarator against the respondent, to compel him to produce and deliver uncanceled the respondent's marriage settlement, whereby (the appellant contended) her husband was to succeed his father in his estate; and also the said disposition and sasine, which (she stated) were made in implement of such marriage settlement: and also to give the appellant relief in the declarator. The respondent made objections to the title of the appellant to carry on the action, as founded on the deed executed by her deceased husband, which being a testament, if it could be supposed to extend to lands, the devise was void by the law of Scotland. The court allowed the process of exhibition at the appellant's instance to proceed, reserving to the respondent all objections against her title after production.

The respondent was afterwards examined upon oath in the exhibition; and made a deposition to the following purport:

"That in 1684, the time of the Test, he was in prison for not complying with the temper of that time, and understood that the government was to press the Test on all heritors, and accordingly by an act of parliament in 1685, the same passed into a law:—that he remained prisoner till 1686, and having taken the advice of lawyers how to preserve his fortune, upon their advice he granted a disposition in favour of his son, a child then 12 years old, both fee and liferent, but burdened with the payment of 60,000*l.* Scots, as the deponent should dispose thereof; that he did this, knowing that Lieutenant-General Drummond was his near relation, and upon sight of such a paper, or being informed of it by the deponent's wife, he could make use of it to protect the deponent from the threatened hazard; and accordingly he did sign that disposition, containing many other conditions and qualities in the deponent's favour, and delivered it to his wife, with a liberty to her to take infeftment upon it or not as she thought fit:—and, that thereafter while he was in prison there was a sasine brought or sent to him by Arthur Nasmyth, who signed as notary to the same, and Nasmyth, by letter, desired him to send it back to him: but the deponent, before he came out of prison, did cancel both the sasine and

“ disposition, upon the information that the king was not to press  
 “ the test with that severity: that Nasmyth wrote to the deponent  
 “ to send it back to him, in respect that it either was not insert  
 “ in his book, or that he was to insert it: that there was no re-  
 “ gistration or mark of registration on the sasine; and as he gave  
 “ it to his wife, so she re-delivered it to him, and when she re-  
 “ delivered it, she told him, that the disposition had never been  
 “ out of her hand, which made the deponent believe there never  
 “ was sasine taken upon it, but that the sasine sent was but a  
 “ sham: but being interrogated if he did not believe it was a  
 “ real sasine, deponed that he believed it was: and deponed that  
 “ he had not had it in his custody, and knew not where the said  
 “ disposition was, but acknowledged that he had the said can-  
 “ celled disposition and sasine, and said that he laid them among  
 “ useless and cancelled papers, but that he had not seen them  
 “ since the intenting of any process between him and his son,  
 “ and having occasion to look through these papers on another  
 “ account, he had not found either of them, and acknowledged  
 “ he did not make a search especially on account of the said  
 “ disposition and sasine, because his wife told him they were burnt  
 “ or destroyed: and being interrogated if or not he had seen the  
 “ said cancelled disposition or sasine after the time that differences  
 “ began to arise between his son and him, deponed that he be-  
 “ lieved he did see them among cancelled papers, but knew  
 “ nothing of them then, farther than that his wife told him they  
 “ were destroyed.—And being interrogated if or not he had the  
 “ contract betwixt himself and his lady, deponed that he had,  
 “ and it should be produced with the investment thereon; but he  
 “ did not know of any former tailzie made by his prede-  
 “ cessors.”

The appellant, after this deposition was made, protested against all the qualities contained in the same, in regard there were no qualities contained in the act which directed such examination to be made.

She also petitioned the Court, that the respondent might be compelled to search for the disposition and sasine, and if found, to exhibit the same in such state, as they then were.—The respondent accordingly was re-examined, and deponed that after search he could not find the disposition and sasine.

After advising these depositions, the Court, on the 26th of July 1706, “ Found that the defender cancelled the disposition and  
 “ seisin warrantably, and that the oath proved not, and assolizied  
 “ the defender from the exhibition, and declared him to be  
 “ free therefrom.”

The appellant presented two reclaiming petitions to the Court, which were severally “ refused, and the former interlocutor ad-  
 “ hered to,” on the 30th of July 1706, and 11th of July 1707. All these interlocutors were carried in favour of the respondent, by a majority of one vote each time.

The

The appeal was brought from "a sentence or decree of the Lords of Council and Session made on the behalf of James Muirhead, the 11th July 1707." Entered, 16  
Dec. 1708.

*Heads of the Appellant's Argument.*

The disposition and settlement was by the infestment taken, and instrument of sasine following thereon, effectually executed according to the law of Scotland. It contained no power of revocation; and the respondent could not lawfully cancel or destroy it.

The appellant brought her husband a considerable fortune, in consideration of which he contracted for certain provisions to be settled upon her.

The respondent's oath proves the execution of the disposition and the infestment taken thereon. What the respondent stated in his oath of his intention in executing the deed, was an extrinsic quality of the oath, and ought not to weigh in this matter. Such motive or covered intention was merely *propositum in mente retentum, quod nihil operatur*.

*Heads of the Respondent's Argument.*

It is a rule of the law of Scotland, that the mind and intention of the grantor at the time of making a deed are principally to be considered. The disposition in question was merely gratuitous, and for no antecedent onerous cause. All the circumstances of the case shew that the respondent made the disposition only to secure his family and protect his estate from forfeiture, and that he never intended to divest himself absolutely. Many similar conveyances were made by gentlemen in Scotland about the same time, and for the same purposes.

This matter having been referred to the respondent's oath, the oath must be taken entire, and with all its qualities. There is no proof of the existence of the deed, but in this oath.

After hearing counsel, *It is ordered and adjudged that the said petition and appeal be dismissed this House, and that the sentence or decree therein complained of be affirmed.* Judgment,  
24 March  
1708-9.

For Appellant, T. Powis. Spencer Cowper.  
For Respondent, John Pratt. P. King.

Cases 3,  
and 4.

Fountain-  
hall, 18th  
Nov. 1703,  
22d Feb.  
1709.

## FIRST APPEAL.

Sir Alexander Brand, Knight, - - - *Appellant*;  
George Mackenzie, - - - - - *Respondent*.  
From a Decree of the Commissioners of Treasury and Exchequer.

## SECOND APPEAL.

Sir Alexander Brand, Knight, - - - *Appellant*;  
Sir Thomas Kennedy, Sir Wm. Binning, and  
Wm. Baird, Gentlemen, - - - *Respondents*.  
From Interlocutors of the Court of Session.

31st March 1710.

*Setty.*—One partner disclaiming money due to the partnership, which in consequence is not paid, they have recourse against him.

*Costs.*—5*l.* given to one of the Respondents.

IN 1693, Sir Alexander Brand, the appellant in both appeals, entered into a contract with the Lords Commissioners of the Treasury in Scotland, to import into that country 5000 stand of arms, according to a pattern then agreed upon. Soon after, an agreement was entered into between Sir Alexander Brand, and Sir Thomas Kennedy and Sir William Binning, two of the respondents in the second appeal, that they should be copartners in the said contract. The arms were accordingly imported, and a memorial was presented to the Treasury, stating that these arms were of superior value to those contracted for in the original pattern. The matter was represented to his then Majesty, who in 1694 appointed the Viscount of Teviot, then General of the Artillery, to inspect the arms, and to give his opinion how much they were better than the pattern, and that an allowance should be made to the appellant accordingly. His Lordship having reported, that the arms were to the value of 1500*l.* better than the pattern, the Lords of the Treasury, by a minute on the 3d of May 1694, allowed the appellant the said sum of 1500*l.*, to be deducted by him out of his rent for the crown lands of Orkney and Zetland, of which he then had a tack.

Sir Alexander executed an acknowledgment or obligation, declaring that Sir Thomas Kennedy and Sir William Binning should have their shares of this additional allowance; but disagreements afterwards arising between the appellant and his partners, Sir Alexander inserted an anonymous advertisement in the Courant, informing the Treasury that they had been much imposed upon in a certain transaction, and offering to disclose the same if properly rewarded. This advertisement was answered by the Treasury, and Sir Alexander stated that he had been imposed upon by his copartners in claiming the said additional allowance, and that there

there was no ground for the same: and Sir Alexander mentioned to the Treasury that he deserved the said 1500*l.* for his great service to the government. Nothing however was at that time done by the Treasury on the subject. The respondents in the second appeal, Sir Thomas and Sir William, brought an action against him before the Court of Session for payment of their proportions of the said 1500*l.*, in which they obtained decret against him on the 24th of June 1704.

The appellant falling in arrear of his rents for Orkney and Zetland, he was sued for the same, before the Commissioners of Treasury and Exchequer, by the then Receiver-General, and afterwards by George Mackenzie, (the respondent in the first appeal) the grantee of the Crown. In 1705 he gave in to these Commissioners a statement of his accounts, in which he acknowledged *"that though he had formerly stated an article of 1500*l.* due to him as the surplus price of 5000 arms, yet having now discovered that there was no ground for any such allowance, he would not claim it."* This statement of accounts was examined by a committee, who made report thereon; and an order or decree of these Commissioners of Treasury and Exchequer was made on the 27th of August 1707, disallowing the whole articles claimed as deductions by the appellant, and also the said sum of 1500*l.*, *because he had waived the same himself under his own hand*, and decerning him to make payment to Mr. Mackenzie of the arrears due of his rents.

The first appeal was brought from "an order and decree of the Lords Commissioners of the Treasury and Exchequer made the 27th of August 1707," and Mr. George Mackenzie the grantee of the Crown, as respondent, gave in answer thereto.

Entered 10  
Feb. 1708-9.

After the date of the said order or decree the appellant granted a bond to the respondent Sir Thomas Kennedy for his proportion of the said 1500*l.*, but refusing to come to a settlement with Sir William Binning, the latter gave him a charge of payment upon the decret obtained before the Court of Session in June 1704. The appellant brought a bill of suspension, and the Court of Session, on the 24th of December 1707, "decerned Sir Alexander Brand the suspender to pay to Sir William Binning the charger the sum of 416*l.* 13*s.* 4*d.* as his proportion of the said 1500*l.* after deducting all expences." And to this interlocutor the Court adhered on the 3d and 8th of January 1708. Sir William Binning afterwards assigned the said sum of 416*l.* 13*s.* 4*d.* to the respondent William Baird.

And the second appeal was brought from "several acts, decrees, and proceedings of the Lords of Council and Session made the 24th June 1704, the 24th of December 1707, and 3d and 8th of January 1708;" and Sir Thomas Kennedy, Sir Wm. Binning, and Wm. Baird, the assignee of the latter, as respondents, put in answer thereto.

Entered 26  
January  
1709-10.

*Of the first Appeal.*

The appellant's case contains a statement of the circumstances that had taken place in this transaction, and of the steps that had been taken against him in Exchequer, with the particulars of the account of discharge produced by him, consisting of nine articles, of which the 1500*l.* before mentioned is one, all of which had been disallowed. But no argument is made use of on his behalf; he merely craves that the proceedings, reports, and decrees against him may be set aside, and that his case may be recommended to the Queen, that he may obtain payment of the balance which he states to be owing to him by the government.

Judgment,  
31 March  
1710.

After hearing counsel, *It is ordered and adjudged, that the sentence or decree complained of be affirmed, except with regard to the first article claimed by Sir Alexander, being 677*l.* 3*s.* for fire-arms, &c. furnished by him to the government; and with respect to this article it is ordered, "that it be referred to the Court of Exchequer "in Scotland whether the said arms were received by the government, "and what value they were of, and that the Court do give the necessary orders in order thereunto."*

For Appellant, *William Atwood.*

*Of the second Appeal.*

Appellant contends, that though the said 1500*l.* was once allowed by the Lords of the Treasury, yet they had now refused the same; and it was unreasonable that he should pay to his co-partners what he himself had no allowance of.

*Respondents' Answer.*

The Lords of the Treasury, in obedience to his late Majesty's letter, allowed the appellant in 1694 the said sum of 1500*l.*, to be deducted by him out of his rents; and he accordingly retained it in his hands, and the Lords of the Treasury acquiesced under the allowance of it till 1705; and though at this period the appellant, by his petition before-mentioned, voluntarily disclaimed the same, and it was accordingly refused by their Lordships, yet it was so refused upon this reason only, viz. *For that the appellant had by writing under his hand disclaimed the same.* But this was done, on his part, merely to defraud his co-partners. But by the appellant's conduct in this affair he cannot be allowed to prejudice his copartners, who have an equal right with himself. So well convinced was he thereof, that, even after the said 1500*l.* had been disclaimed by him and refused by the Treasury, he granted bond to Sir Thomas Kennedy for his share, and afterwards paid him a moiety of the money.

After



After hearing counsel, *It is ordered and adjudged, that the petition and appeal of Sir Alexander Brand be dismissed, and that the several acts, decrees, and proceedings therein complained of be affirmed; and that the said Sir Alexander Brand shall pay or cause to be paid to the respondent Sir Thomas Kennedy the sum of 51. for his costs.* Judgment, 31 March 1710.

For Respondents, *Da. Dalrymple.*  
*John Pratt.*

Only one case in each appeal has been found.

Patrick Lord Kinnaird, and Lady Elizabeth  
his Wife, - - - *Appellants;* Case 5.  
John Riddoch the Trustee of Catharine Lyon,  
and the said Catharine Lyon, - - - *Respondents.*

24th January 1710-11.

*Appeal.*—An appeal dismissed and costs awarded, and directions given to levy the same against Appellants who had entered into no recognizance.

ON the 21st of March 1709-10, the appellants brought their appeal from a decree of the Court of Session of the 28th of February then last, by which the Court had preferred the respondents as creditors of the Earl of Aboyne deceased, to the rents of his Lordship's estates for the years 1707 and 1708, to the appellant Elizabeth, who had an annuity out of the said Earl's (her first husband's) estate. An order was made to put in answer to this appeal, and Riddoch accordingly answered on the 21st of December 1709; and upon his petition, it was ordered "that the cause should be heard on the 18th of January following, and that in the mean time Lord Kinnaird should enter into a recognizance to answer costs as usual (a)."

This order was served upon Lord Kinnaird at Aberdeen; but no notice was taken of it, nor did his Lordship enter into any recognizance, or appear on the day appointed for hearing. On the 24th of January 1710-11, the respondents presented a petition to the House, stating the above facts, and that the appeal had been presented merely for delay, and praying that it might be dismissed with exemplary costs: and along with this petition was presented this affidavit of service upon Lord Kinnaird.

*After due consideration of this case, it is ordered, that the petition and appeal be dismissed; and it is further ordered, that the said Lord Kinnaird and his wife shall pay or cause to be paid to the* Journal, 24 Jan. 1710-11.

(a) Recognizances at that period were to be entered into according to the terms of the standing order of 20th November, 1680, namely, that the Appellant should, "before any answer to his petition," enter into a recognizance for 100l.

*said*

said John Riddoch, for Catherine Lyon, or to the said Catherine Lyon, the sum of 40l. for her costs and charges caused by the said appeal.

Two days after the date of this order, the standing order of 26th January 1710-11 relative to recognizances was made, which directs that appellants shall enter into recognizance of the penalty of one hundred pounds within 8 days after the appeal received, to pay such costs as should be awarded.

On the 17th of March 1710-11, Catherine Lyon presented a petition to the House, stating that Lady Kinnaird had been served with the former order, and refused to obey the same, of which the petitioner produced affidavit.

Journal,  
22d March  
1710-11.

*It is ordered that these words be added to the former order, viz.*  
*"And that the Lords of Council and Session in North-Britain do*  
*order the 40l. costs, given by this House to Catherine Lyon, to be*  
*levied by the same rules and methods as costs given by them are to*  
*be levied."*

#### Case 6.

Fountain-  
hall, 8th  
Nov. and  
30th Dec.  
1709.

James Greenfields, Clerk, - - - Appellant;  
 The Lord Provost and Magistrates of the  
 City of Edinburgh, - - - Respondents.

1st March 1710-11.

*Appeal* — An appeal competent, though objection made that it implicated the sentence of a presbytery.

*Kirk Government.* — Proceedings against an episcopal minister, before the Toleration Act, 10 Ann. c. 7. who had been imprisoned for exercising his function, reversed on appeal.

THE appellant, by birth a Scotsman, in 1709 opened a private chapel in Edinburgh, where he exercised a ministerial function to some members of the communion of the Church of England. The Presbytery of Edinburgh summoned him to appear before them, and to "give an account of himself, and of his presuming without authority to exercise the office of the holy ministry publicly on the Lord's day." He appeared accordingly, and produced to the Presbytery a diploma of his ordination as a presbyter *secundum ritus et formas Ecclesie Scotice* from the Bishop of Ross in Scotland, but dated in 1694 after abolition of episcopacy in that country: and he stated that his orders had been allowed in Ireland, where he had taken the oaths to government, and served two curacies with a fair reputation, of which he produced a certificate from the Archbishop of Armagh, and some of his clergy: but he declined the jurisdiction of the Presbytery. They thereupon prohibited him from exercising the office of a minister, for the reason of its "being within their bounds, and without  
 " their

“ their allowance, and introducing a form of worship contrary to  
 “ the purity and uniformity of the church established by law.”  
 And they recommended it to the magistrates of Edinburgh to render this prohibition more effectual.

The respondents, in consequence of this recommendation, and of a petition (as they state in their case) *signed by many hundred hands of the most considerable in the neighbourhood*, cited the appellant to appear before them; and on his appearing they required him to obey the act of the Presbytery. The appellant, however, still continued in the exercise of the ministry as before, and the magistrates by their sentence on the 15th of September 1709 ordered him to be committed to gaol, “ there to remain until he should  
 “ give security to desist from the exercise of the ministry within  
 “ their bounds, or to remove himself from thence.”

The appellant being accordingly committed to prison, he presented a bill of suspension to the Court of Session, to which the respondents put in answers, insisting “ that the suspender having  
 “ received ordination from the Bishop of Ross after the abolition  
 “ of episcopacy in Scotland, and the said bishops being excommunicated, the suspender was not a minister duly qualified.” In respect of these answers, the Court on the 8th of November 1709 “ refused the bill.” The appellant having presented a second bill of suspension, to which the respondents made answers, the Court on the 28th December 1709 also refused the same. And the appellant remained in prison *seven months*.

The appeal was brought from “ the sentence of the magistrates  
 “ of Edinburgh and a decree of the Lords of Session, the first the  
 “ 15th of September, and the last the 28th of December 1709,”

Entered  
 13 February  
 1709-10.

A preliminary question arose, whether the appeal was regularly and properly before the House or not; and leave was given to argue this question in the first place.

*Argument of the Respondents on this preliminary Point.*

There is no place for this appeal from the Presbytery of Edinburgh: the Presbytery is only a subordinate ecclesiastical judicatory, from which appeals lie in course to a provincial synod, or the general assembly. The appellant cannot in law or good order appeal to the House of Lords, who are only judges upon appeals in the *last resort*.

If this appeal should be held to lie from the sentence of the Presbytery, the appellant has not summoned or called the proper respondents: the sentence of the Presbytery cannot be reviewed unless they themselves be called to answer for it; and the respondents are not the proper parties to make answer in this case.

Although the appellant pretends only to appeal from the decree of the Court of Session, and the sentence of the respondents, it is evident that he directly libels the sentence of the Presbytery as groundless and illegal, and therefore to be reviewed; which is in  
 fact

fact an appeal from it. It is manifest, that the sentence of the respondents was purely executive; and they were no further concerned, than to make the sentence of the Presbytery effectual, as they were obliged to do by law, (particularly by the act of Parliament 1693, c. 22. for settling the peace and quiet of the Church, whereby it is expressly enacted, "that all magistrates, judges, "and officers of justice give all due assistance for making the "sentences and censures of the Church and judicatories thereof "to be obeyed,)" without inquiring into the reason of that sentence, which was wholly *alterius fori*, and not liable to their cognizance. The respondents therefore cannot be questioned for what they did in obedience to law, unless they had exceeded their authority in the execution; which they did not, nor is it pretended by the appellant that they did.

But if the magistrates had exceeded in the execution, the appellant had the obvious remedy, which in fact he laid hold of, viz. to complain to the Court of Session by bill of suspension. It is certain in law, that no appeal can be made from the execution of any sentence, unless the appeal be first brought from the sentence itself; and it is supposed that the same doctrine holds in the Church of England, when writs are issued of course for executing ecclesiastical sentences, as the writ *de excommunicato capiendo*, from which though it be a civil writ, yet being in execution of the sentence of an ecclesiastical court, there lies no appeal, unless the sentence itself be first reviewed by the proper judicatory.

Before the late Union of the two nations, it was never known that any appeal from the ecclesiastical judicatories of the Church lay properly or regularly to the Parliament of Scotland, nor can any precedent of such appeals be produced.

The appellant's argument on this preliminary point does not appear; but counsel being heard upon this preliminary point, *Resolved, that the petition and appeal of this appellant is regularly and properly before the House.*

#### *On the Merits. Heads of the Appellant's Argument.*

Though Presbytery be the legal established church government in Scotland, yet there is no law of conformity in that country which obliges the laity to be of their communion, nor any law which prohibits the ministers of the communion of the Church of England from exercising their function, or the laity from joining in worship with them in a private manner, or which gives the magistracy any jurisdiction to inflict penalties on such ministers or laity. The acts of Parliament on which the sentences against the appellant are pretended to be founded, and particularly the act 1695, c. 22. against intrusion into churches, were never intended against persons in similar circumstances with the appellant. The appellant never intruded into any church or benefice, or deprived any person of his right, but exercised his function only in a private

Journal,  
1st March  
1780-11.

1695. c. 22.

a private house to those of the same communion with himself. Nor is imprisonment warranted by any of the said acts.

The Court of Session ought only to have affirmed or reversed the sentence of the magistrates for the reason upon which it was founded, namely, that contained in the act of the Presbytery; and they ought not to have proceeded to judgment upon any new reason.

And even if the Court might have founded their judgment upon a new reason, yet their decree, as to such new reason, is contrary to the principles and practice not only of the Christian Church in general, but also of the present Church of Scotland, which admits Presbyters ordained by exauctorated Presbyters, and also Presbyters ordained by Bishops in similar circumstances with the appellant, whose ordinations have been allowed, and themselves admitted to the cure of souls, as rightly ordained.

*Heads of the Respondents' Argument.*

The respondents rely for a full justification of the proceedings both of the Presbytery and themselves against the appellant, by the following acts of Parliament, which are all unalterably confirmed by the Union; viz.

1. The act W. & M. 1689, c. 3. intituled, "Act abolishing W. and M. 1689. c. 3.  
"Prelacy."
2. The act 1690, c. 5. intituled, "Act ratifying the Confes- 1690. c. 5.  
"sion of Faith, and settling Presbyterian Church Government."
3. An act 1693, c. 6. intituled "Act for taking the oath of 1693. c. 6.  
"allegiance and assurance."
4. An act 1693, c. 22. intituled, "Act for settling the peace 1693. c. 22,  
and quiet of the church."

And also by a proclamation of the 21st of March 1706, intituled, "An act and proclamation anent intruders into churches," by which (*inter alia*) "the queen and the lords of her Majesty's privy council, prohibit and discharge all persons, who have no authority from within the church of Scotland, but pretend to a warrant or licence from the late exauctorat bishops, since they were exauctorat, to exercise any part of the ministerial function, within this church, or any kirk or paroch thereof, upon pain of being seized and secured by the magistrates of the bounds, in order to their trial, pursuant to the act of parliament of 1693, and the magistrates are required to seize and secure such persons, and punish them according to law."

And after hearing counsel on the merits, *It is ordered and ad- Judgment, 1st March 1710-11.*  
judged, that the sentence of the magistrates of Edinburgh, and the decree of the Lords of Session in North Britain, made against the said James Greenfields, be reversed.

For Appellant, *Tho. Lutwyche, Hum. Henchman.*  
For Respondents, *Peter King.*

Soon

Soon after the decision in this appeal, an act of parliament was passed, 10 Ann. c. 7. intituled, "An act to prevent the disturbing of those of the episcopal communion in Scotland."

Preface to  
the History  
of the  
Union, p. 19  
et seq.

It is stated by Desfoe, that the preaching of Mr. Greenfields excited much disturbance in Scotland, and alarm for the safety of the established church. Addresses were presented to the general assembly from Edinburgh and from Haddington; and similar addresses were preparing almost all over the kingdom, when the proceedings were commenced against Mr. Greenfields.

Case 7. James Durham of Largo Esq. - - - *Appellant*;  
Robert Lundine Esq. of Lundine, Alexander  
Watson of Aithernie, Andrew Lundine of  
Straitherlie, and John Lundine of Baldafter, *Respondents*.

20th March 1710-11.

*Appeal*.—An appeal competent, from a decret in 1698, and interlocutor in 1708, though objection made that a decret in 1707, confirming that in 1698, was not appealed from.

*Teinds*.—Prorogations of tacks of teinds, where an augmentation of stipend was small, reduced from six 19 years to one 19 years.

THE appellant was patron of the parish of Largo. In 1698, the then minister of Largo, during the appellant's minority, obtained decret of the *commissioners for plantation of Kirks and valuation of Teinds*, for an augmentation to his stipend of about 14*l.* per annum, which was allocated upon the teinds of several heritors of the parish:—And in consideration of this augmentation, the commissioners granted to the respondents, who were tacksmen of teinds in the parish, prorogations of their tacks for six 19 years, to commence after expiration of their current tacks, which had then eight years to run. This decret mentioned the shares of the whole stipend to be paid by the proprietors of lands in the parish, part being to be paid out of the teinds of lands belonging to the appellant.

In 1707 the appellant obtained a decret of the Lords of Session against the respondents, by which their old tacks were declared to have expired in 1706, yet the decret of the commissioners in 1698, for prolonging their respective terms, was thereby confirmed.

In 1708 the appellant brought an action before the Lords of Session, as commissioners for plantation of Kirks and valuation of teinds, for reduction of the said decret of 1698, on the grounds that it had been obtained during his minority, that no part of the stipend ought to have been allocated upon his teinds, and that the prorogations granted to the tacksmen were altogether disproportionate to the augmented stipend charged upon their teinds.

The

The Lords Commissioners, on the 23d of June 1708, "found and declared, that the appellant was not prejudiced by his not claiming that his own lands ought to have been exempted from paying his proportion of the minister's stipend; and therefore refused to relieve the appellant from the said decree of the Commissioners for planting of Kirks in 1698, and dismissed his action."—The appellant reclaimed, and the commissioners, on a rehearing of the cause in July 1708, adhered to their former interlocutor.

The appeal was brought from "a decree or sentence of the Lords of Council and Session, pronounced the 23d day of June 1708, and a rehearing thereof in July following, whereby they have affirmed the prolongations, granted by the Commissioners for plantation of Churches, to the respondents, of their respective tithes within the parish of Largo."

Entered  
2 January  
1710-11.

#### *Heads of the Appellant's Argument.*

By an act of the Scots parliament, 1693, c. 25. it is expressly provided, that the teinds of the lands belonging in property to the patron should be freed from paying any part of the maintenance of the minister, but that the same should be laid proportionally upon the teinds of the respective proprietors of the parish. From this, it appears, that the decret of 1698, appealed from, whereby the appellant's own lands were burthened with a considerable part of the minister's maintenance, is expressly contrary to the said act of parliament; and he ought to have been relieved against this decret, which was pronounced during his minority.

Though by the act 1690, c. 23. the patron's right to the teinds is burthened with the tacks then subsisting, or prolongations thereof to be made, yet that only hinders the patron from making any greater demand upon tacksmen, while their tacks are current, than the tack duties therein contained; and does not preclude, but that after expiration of these tacks, the patron shall be entitled to have his own lands exempted, and to have the share of the stipend formerly paid by him laid proportionally on the respective proprietors of lands in the parish, who in recompence have prolongations made of their tacks.

The said act 1690, c. 23. expressly imports that all prolongations to be granted of tacks of teinds shall be *effeiring* to the augmentation granted. But in the present case no such proportion has been observed; for the augmentation is only about 14*l.* *per annum*, and the teinds of the parish, exclusive of those of the appellant's own lands, over and above paying the whole stipend to the minister, are worth about 100*l.* *per annum*.

#### *Heads of the Argument of the Respondent Robert Lundine (a).*

This appeal is not regularly brought; for the decree which the appellant obtained in 1707, declaring the old leases to be expired, but ratifying the decree of 1698, is not appealed from by him.

(a) No other respondent's case has been found.

C

And

And therefore though the decree of 1708 should be reversed, that of 1707 must still subsist.

In 1633, Patrick Black, then patron of the parish of Largo, (to whom the appellant is singular successor in this patronage and estate of Largo,) having right to the whole teinds of the parish by a tack from the then parson, did, for an onerous consideration, sell and dispone to the respondent's ancestor, not only all his then interest in the teinds of the estate of Lundine, by virtue of the tack granted to him or otherwise, but also all such future right and title to the said teinds as he the said Patrick Black, his heirs or successors, should or might claim or acquire, so far as concerned the lands and barony of Lundine. And he thereby obliged himself, his heirs and successors, patrons of the said church and parish of Largo, to do all further acts for establishing heritably, or otherwise, the right of the teinds of the lands and barony of Lundine, in property to the respondent's ancestor, his heirs and successors, he and they indemnifying the said Patrick Black, his heirs and successors, from the minister's stipends laid or to be laid on the lands of Lundine: and Patrick Black then agreed to take a proportional share with the respondent, and other heritors, of the minister's stipend upon his own lands.—When the appellant's ancestor, therefore, purchased the said estate and patronage of Largo, he took it with such share of the minister's stipend charged thereon, and had an allowance for the same in his purchase. The right of the respondent's ancestor to the teinds of his own estate, is by the same acts of parliament whereon the appellant founds his right expressly excepted and reserved to him by these words, "*not heritably disposed*."—Thus the same accidental interest, which was by that act given to patrons, did as to the teinds of his own estate accrue to the respondent; and in this respect the appellant's case is quite different from that of other patrons and heritors.

By the decret of 1698, the appellant's estate is not charged with any part of the augmented stipend, it only charges him with part of the old stipend, which Patrick Black, his predecessor, took upon himself, and which was deducted in the purchase by the appellant's ancestor.

The same act of parliament which gave to patrons the right to teinds "*not heritably disposed*," did it with the burthen of augmentations to the stipends of ministers, and of tacks and prolongations thereof to heritors: and the prolongation to the respondent granted in the decret of 1698, is warranted by all the acts appointing Commissioners for plantation of Kirks, &c., who are thereby empowered to grant such prolongations, without any restriction as to the length of the then current tacks, or for what terms they should be prolonged.

After hearing counsel, *It is ordered and adjudged, that the decree or sentence complained of in the said appeal made in the year 1698 by the Commissioners for the plantation of Churches for prolongation of the leases therein mentioned for six 19 years, and the decree or sentence made in the year 1708, by the Lords of Council and Session in North Britain*

Judgment,  
20 March  
1740-11.



*Britain in affirmance of the former decree or sentence as to the prolongation of the said leases be reversed, so far as the same relates to the prolongation of the said leases, except only as to the first nineteen years of the fix 19 years.*

For Appellant, *Jo. Pringle.*  
For Respondents, *Sam. Dodd.*

Sir Andrew Kennedy, Baronet, - - *Appellant;*  
Sir Alexander Cuming, Baronet, - - *Respondent.*

19th April 1711.

*Public Officer.*—The office of conservator, held by a grant under the great seal to a father and his son jointly, being upon complaint of the father's malversations granted to a third person, without previous sentence; this new grant was void.

Certain malversations alleged against the conservator not relevant to infer deprivation.

*Proof.*—The malversations of a conservator being found proved *per singulares testes*, the judgment is reversed.

*Act of indemnity.*—Malversation thereby remitted.

*Expences* of the court below given to an appellant.

Proceedings on the mode of ascertaining the amount of these expences.

Cafe 8.  
Fountain-  
hall, 3d Jan.  
1706.  
19 March,  
19 Nov.  
9 Dec. 1707.  
16 Jan.  
24 Feb.  
9 Dec. 1708.  
5 Feb. 1709.  
Foibes,  
3 Jan. 1706.  
18 March,  
19 Nov.  
1707. 16  
Jan. 1708.

THE office of Conservator of the Scots Privileges in the Netherlands is very antient; it was held by grant under the great seal of Scotland: to it several powers and faculties were committed in relation to trade, treaties with foreign states, and other matters that concerned the government and public peace.

By many ancient treaties, and by a contract made between the royal burghs of Scotland, with the approbation of his Majesty King William, on the one part, and the states of Zealand and town of Campvere on the other part, in 1699, and by an act of the parliament of Scotland, Campvere was appointed the port where all staple goods, such as linens, woollens, hides, butter, oil, tallow, pork, beef, salmon, lead ore, &c. of the manufacture, growth, and produce of Scotland were to be landed. By this contract the Scots had many privileges and advantages.

For the better maintaining these privileges, and that the conservator might have more ready access to the states and their senates abroad, he was vested with the character of a public minister, as resident for the whole provinces; and had jurisdiction over Scotsmen both civil and criminal. By several acts of parliament he was obliged to keep courts, and administer justice according to the laws of Scotland, and those who sued before any other judicature were punishable: where differences arose between the Scots and Dutch, the conservator was to appoint arbitrators; and if they made no determination, he was to sit and judge with Dutch magistrates.

1503, c. 87.  
1579, c. 96.

Their Majesties King William and Queen Mary, in 1689, granted a commission under the great seal of Scotland to the appellant to be conservator of the Scots privileges in the Netherlands, and their Majesties' resident for the affairs of Scotland within the seventeen United Provinces for and during his life. In 1697, a new grant was obtained of the said office from King William, also under the great seal of Scotland, to the appellant, Sir Andrew, and his son John Vere Kennedy jointly during Sir Andrew's life, and after his death to John Vere Kennedy for and during his Majesty's pleasure.

The office of conservator was administered for some time under these grants, by the appellant (a): complaints, soon after, began to be made by the states of Zealand and the magistrates of Campvere to King William, and to the royal burghs, and afterwards to Queen Anne, of a non-observance of the staple contract. The parties in this appeal are not agreed with regard to the grounds of such complaints; the respondent states, that they were occasioned by the appellant and his son having neglected and abused their trusts; whereas the appellant mentions, that the original memorials from the states of Zealand and the magistrates of Campvere did not criminate or charge him; but that afterwards, at the instigation of one Isaac Denheldt, burgo-master of Campvere, his personal enemy, letters were written to the convention of royal burghs, complaining of his administration.

In 1702, the convention of royal burghs gave commission to two persons to go to Campvere, and to investigate these complaints. The parties, likewise, are not agreed with regard to the proceedings of these commissioners. The appellant states, that after their arrival Denheldt gave in several complaints against him, which being laid before the royal burghs, they were all after a strict examination found groundless; and the royal burghs never did pass any sentence or censure upon the appellant: the respondent, on the contrary, mentions, that the commissioners having made their report to their principals, it appeared that the appellant and his son had been guilty of very great misdemeanors; that this report being ratified by a new committee of the burghs, an abstract thereof was made, and the report laid before her then Majesty.

On the 7th of April 1705, her Majesty executed a warrant for a new grant of the said office to be made in favour of the respondent Sir Alexander Cuming, proceeding upon a recital, that *after trial and cognition of Sir Andrew Kennedy's and his son's malversations in their said office, they had forfeited the same*; and her Majesty thereby ordained her advocate and solicitors to prosecute all actions necessary for annulling the former grant, and for making that in favour of the respondent effectual. A commission in consequence thereof passed the seal, and the respondent entered upon his

(a) It does not with certainty appear whether the appellant's son took any part of the administration: the respondent states that the appellant and his son did not take the oaths upon their joint grant of the office, and though the son is charged generally in some parts of the respondent's case with misdemeanors, no particular instances are stated.

office, and was received as her Majesty's minister by the States General of the town of Campvere.

The appellant thereupon commenced an action of reduction and declarator before the Court of Session against the respondent, for reduction of the commission granted to the latter, and to have his own right under the former commission declared. In this action he insisted that the grant to the respondent proceeded upon misrepresentation of matters of fact; that the Queen's warrant was razed in essential places, and that it was contrary to the claim of right, ratified by act of parliament 1703, c. 3., which declares all forfeitures before sentence to be against law. The Court found "that Sir Alexander Cuming could not warrantably obtain possession of the said office by virtue of his commission until Sir Andrew Kennedy's action of reduction and declarator were determined, or that Sir Alexander had obtained a decret declaring his right thereto."

A counter-action was afterwards brought in name of the respondent and the officers of state for affirming the grant of the office to him; and to have it declared, that the appellant by malversations in his office had incurred a forfeiture of the same. Various articles of misdemeanor were insisted upon by the respondent; but, as these form no part of the question at issue by the present appeal, they are not here detailed. A proof was taken both in Scotland and in the Netherlands, and many witnesses were examined; parties were afterwards heard upon the proof, and a new matter of dispute arose in the cause, namely, an act of indemnity, made in 1703, and ratified by parliament, bearing to be a full amnesty of all transgressions in public offices, and a bar to all prosecutions for such transgressions preceding that date. Parties are not agreed with regard to the manner in which this matter of the indemnity arose in the cause. The appellant states, that it was taken notice of by the Court, without having been pleaded by him: whereas the respondent mentions that *it was so pleaded* by the appellant, as appeared from several places of the decree, though he would now *untruly* suggest the contrary.

Parties were heard by order of the Court on this point of the indemnity; and the respondent contended, that the act did not extend to pardon offences in ministers abroad committed against foreign states, who in this case were prosecutors, and ought not to be debarred of their right, by the law of nations, of being freed from a minister, whom they had complained of in their letters and memorials as *negligent, factious, seditious, turbulent, and vexatious*. And though the said act might excuse the appellant from being punished, it could not be extended to restore him to an office which he had forfeited, nor repute him to that reputation which was necessary for the public service abroad. "*Indulgentia, patres conscripti, quos liberat, notat; nec infamiam criminis tollit, sed potius gratiam facit. L. 9. Cod. T. 43. de generali abolitione.*" The Court sustained the defence founded on the indemnity as to all malversations of omission or commission committed by the

appellant preceding the date thereof. And so far the judgment of the Court is not appealed from.

The cause being thus narrowed, the respondent insisted that the appellant had been guilty of misdemeanors since the date of the indemnity; and the cause being heard, the Court on the 9th of December 1707 pronounced the following interlocutor: "Having considered the state of the process, and having advised the debate, with the depositions of the witnesses, and writs produced, find it proved that the appellant did, since the act of indemnity, receive conservator dues for staple goods belonging to Dutch and Irishmen coming directly from Ireland to the staple port of Campvere, and that he was in the knowledge thereof, which they find to be a malversation in his office of conservator relevant to infer deprivation; and therefore reduce the gift in the appellant's favour, and decern and declare the respondent's right to the said office by virtue of his commission." The appellant reclaimed, and the cause being re-heard, the Court adhered to their former interlocutor.

Entered  
20 February  
1710-11.

The appeal was brought from "a decree made by the Lords of Council and Session the 9th December 1707."

#### *Heads of the Appellant's Argument.*

The respondent's commission is contrary to law, and granted upon a misrepresentation made to her Majesty, and on that account the respondent had no title to sue the appellant for any misdemeanors, though he had been really guilty thereof, as in fact he was not. And further the warrant for the respondent's commission, after it had passed her Majesty's royal hand, was razed in two very material places; the first, where her Majesty does actually recal the commission granted to the respondent, and his son, three lines are razed out; the other, where her Majesty orders the great seal to be appended, the word *thereunto* is razed out, and the words *and pass per saltum* are put in.—By this last alteration the respondent prevented the commission from being laid before the Privy Council, as was usual, having no reason to believe the Privy Council would agree to the passing a commission against law; especially since the warrant had been razed after her Majesty had signed it.

The facts alleged to have been committed by the appellant were according to usual and former practice in the office, and not sufficient to infer a forfeiture; and even these facts were not proved against him by two unexceptionable witnesses. For by the law of Scotland no proof is sustained, unless upon the oath or testimony of two lawful witnesses to one and the same fact; but the two witnesses, Hamilton and Douglas, upon whose evidence only this decree is founded, depone to things entirely different. And even this evidence does not amount to a proof of the misdemeanor laid to the appellant's charge, viz. *That he was in the knowledge thereof.*

*Heads*

*Heads of the Respondent's Argument.*

The clause delete in the warrant was thought superfluous, and scored out by the chancellor in favour of the appellant, that he might not be precluded from justifying himself if he was innocent. There was no objection upon this pretended nullity, until after the decree was pronounced, and it could not then be received: nor would it have availed the appellant at any time, he being prosecuted at the queen's suit.—As the respondent's grant under the great seal was sufficient; so he has a new commission, ratifying and confirming the former in every article, and conferring the office *de novo*.—And as to the pretended addition of the words *per saltum* in the warrant, the same is false, as may appear by the warrant itself, and secretary's docket.

The malversations, subsequent to the indemnity, on which the Court pronounced judgment, were, That contrary to the 3d and 13th articles of the Staple Contract, made in the appellant's own time, and an express order of the burghs *anno* 1699, and his own signed instructions, he had betrayed his trust, by allowing the importation of Irish goods belonging to Dutchmen, &c., and permitting the same (for a gratification to himself) to be entered at the staple port as Scots goods, and thereby to enjoy the immunity of customs, &c. to the great loss of the trade, manufactures, and native produce of his nation. And those were proved by ten concurrent witnesses (a). There have been grants of the same and other offices upon misdemeanors of persons having them for life, without any previous sentence, or so much as an inquisition of such misdemeanors or proofs thereof from record as there were in this case. And the appellant being a foreign minister, and as such having injured foreign states, there was no need of a formal sentence, before issuing out the grant, the proofs of his misdemeanors upon record being sufficient. And the prosecutors were not bound to wait relief from the decree of ordinary judicatures, but had immediate recourse to the fountain of justice, her Majesty being in some measure answerable for his behaviour, and so of herself capable to grant redress, which was necessary for preserving the public peace, and preventing reprisals, embargoes, and arrests, &c. which are the common remedies where justice is denied or delayed to sovereign states.

After hearing counsel, it is ordered and adjudged, that the decree of the Lords of Council and Session in Scotland, complained of in the appeal of Sir Andrew Kennedy, be reversed: and it is declared and adjudged, that the said commission granted by her Majesty to Sir Alexander Cumming is void, and that the said commission granted to Sir Andrew Kennedy and John Vere Kennedy is still subsisting in full force: And it is further ordered, that the Lords of Council and Session do direct the expences in these suits to be taxed according to the course of their Court, and paid to Sir Andrew Kennedy by Sir Alexander Cumming: and that

Judgment,  
19 April  
1711.

(a) From Fountainhall, 16th Jan. 1708, it appears that the witnesses on the point appealed from were *singularis testis*, notwithstanding this general allegation of the respondent.

*Sir Andrew Kennedy be quieted in the enjoyment of the said office; and as to the mesne profits of the said office the said Sir Andrew Kennedy is left at liberty to pursue such remedy as he shall be advised to take for the same.*

For Appellant, John Pratt. P King.  
For Respondent, Edward Northey. Robert Raymond.

After discussing the Appeal.  
Fountain-hall, 25 July 1711.  
25 June, 26 July 1712.  
Forbes, 21 July, 9 Nov. 1711.  
26 June, 30 July 1712.  
Journal, 2 June 1712.  
17 June and 7 July 1714.

*Proceedings with regard to the Expences of the Court below, awarded to the Appellant.*

ON the 2d of June 1712, a petition of Sir Andrew Kennedy was presented to the House, shewing, "That the House, the 19th of April 1711, upon hearing an appeal brought by the petitioner against a decree made by the Lords of Council and Session in Scotland on the behalf of Sir Alexander Cuming, did reverse the said decree, and order the Lords of Session to direct the expences in the suits mentioned in the said order to be taxed according to the course of their court, and to be paid to the petitioner by the said Sir Alexander; and that on the 4th of July last the petitioner did apply to the said Lords of Session in order to have the said expences taxed, but they had delayed the doing thereof."—And the petition prayed, "that the House would be pleased to tax the said expences, or order the Lords of Session forthwith to tax the same."—Upon this petition an order was made, "that the Lords of Council and Session should forthwith tax the said expences, and direct the same to be paid to the petitioner pursuant to the order and judgment of the House."

On the 17th of June 1714, a petition of Sir Andrew Kennedy and John Vere Kennedy his son, conservators of the Scots privileges in the Netherlands, was presented to the House and read; reciting the judgment of the 19th of April 1711, and complaining of the contempt of the said judgment, and praying, "That directions might be given for satisfying the petitioners for their great and extraordinary damages sustained thereby; and that the said judgment might be made effectual, so that the petitioner might have the costs paid him which the Lords of Session had decreed, in such manner as to the House should seem meet." This petition was referred to a committee to examine the allegations thereof, and report their opinion thereupon to the House.

On the 7th July thereafter the committee made their report, "That the committee had considered the said petition, and examined the allegations thereof, and heard the parties in relation thereunto; and it appearing that Sir Alexander Cuming had not made payment of the costs, which pursuant to the said order or judgment of the House were taxed by the Lords of Session at the sum of 100*l.* sterling; and notwithstanding the said Sir Alexander did pretend to be entitled to a debt owing by Sir Andrew, for which he pleaded compensation; as also that the creditors of Sir Andrew had attached this sum in his hands;  
"never;

“ nevertheless, neither of the said allegations were made good by  
 “ the said Sir Alexander: and in respect the said costs ought to have  
 “ been immediately paid, the committee were therefore of opi-  
 “ nion, that the said sum of 100*l.* ought to be forthwith paid to  
 “ the said Sir Andrew, and which ought to be declared no way  
 “ subject to or affectable by any pretence of compensation or at-  
 “ tachment:—and it having further appeared to the committee  
 “ that Sir Andrew Kennedy and John Vere Kennedy his son had  
 “ not the full enjoyment and possession of their office of conser-  
 “ vator as directed by the order of the House, notwithstanding  
 “ her Majesty’s letter to the States General on behalf of the said  
 “ Sir Andrew and his son; and that Sir Andrew in endeavour-  
 “ ing to obtain possession of his said office having been put to  
 “ very great trouble and expence, occasioned chiefly by a poste-  
 “ rior commission granted to Sir Alexander Cuming under the  
 “ great seal for the said office (which had been presented to the  
 “ States of Zealand and magistrates of Campvere); it was there-  
 “ fore the opinion of the committee, that the House should be  
 “ moved, that an humble address should be presented to her Ma-  
 “ jesty, that her Majesty would be graciously pleased to grant a  
 “ new posterior commission of the aforesaid office of conservator  
 “ to the said Sir Andrew Kennedy and John Vere Kennedy, that  
 “ thereby the said order of the House might be rendered effectual  
 “ to them.”

This report was agreed to by the House, and orders accordingly  
 made in terms thereof.

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In the Dictionary of Decisions, vol. II. voce Presumption,  
 p. 153. a judgment of the Court of Session sustaining the gift in  
 favour of the respondent, though some words were added to its  
 warrant, and others scored out, is given as a subsisting decision;  
 but as this gift was totally reduced by the House of Lords, the  
 judgment is not now an existing precedent.

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It appears from Fountainhall (26th July 1712), that Sir An-  
 drew Kennedy stated to the Court of Session, that the ground of the  
 judgment of the House of Lords was, “ that they found neither  
 “ a just nor a probable cause on Sir Alexander Cuming’s part,  
 “ his gift being impetrate from the queen by obreption and sur-  
 “ prise against the claim of right securing liferent offices, and  
 “ on a false narrative of Sir Andrew’s malversations; and the  
 “ warrant vitiate and scored and found to be a null right; who  
 “ on all these grounds had modified expences.”

Cafe 9  
Fountain-  
hall, 15 July  
1710.  
Forbes,  
24 July  
1710.

Katherine Moniepenney, Widow, - - *Appellant*;  
John Brown, and Isabel his Wife, - - *Respondents.*

15th May 1711.

*Testament.*—A testament executed in *extremis* reduced, where the testator's hand was supported and assisted in writing the latter part of his name.

THE respondent Isabel, sister to the late George Moncrieff of Sauchop, and John Brown her husband, brought an action before the Court of Session for reduction of Mr. Moncrieff's last will and testament as not having been duly executed. It bore date the 19th of November 1707, the day of Mr. Moncrieff's death, and by it great part of his personal estate was bequeathed to the appellant his widow, whom he appointed executrix. A proof was taken in this action, by which it appeared that the deceased, whose disorder was a consumption, on the said 19th of November, the day of his death, gave directions to one Watson for drawing the will, and approved of it when read over to him; that he wrote part of his name to the will, (George Mon) but was assisted in writing the latter part, which differed from the mode in which the deceased had been accustomed to spell his name; and that he died a short time afterwards.

The Court on the 14th of July 1710 "declared the said testament null and void, the subscription not being finished by the deceased without assistance, nor executed according to law." And by a second interlocutor on the 15th of November 1710, the Court "found, that the testator did not complete his subscription, but that his hand wavering he was supported by the writer, who assisted him to write the last syllable of his name, and therefore declared the said will null and void."

Upon the appellant's petition witnesses were re-examined upon this point, whether they had heard the testator acknowledge his subscription after the will was signed; and the Court by their interlocutor on the 3d of February 1711 "found this not proved, and therefore adhered to the former interlocutors, and reduced the said will."

The appeal was brought from "a decree of the Lords of Council and Session of the 14th of July 1710, and the affirmation thereof the 3d of February following."

Entered,  
22 March  
1710-11.

#### *Heads of the Appellant's Argument.*

The will is in itself a most just and equal disposition of the personal estate of the testator. All the witnesses agree, too, that the testator was of perfect and sound judgment, and that he most distinctly gave directions to Watson to write the will as it now stands, and named and sent for the particular persons that he wished to have as witnesses to the execution of it. And Watson having written out the will according to these directions, he read the same to the testator, who being asked if he was pleased there-  
with,



with, answered he was very well pleased: that thereupon the testator signed the same, and wrote *George Mon* without any assistance; but Watson perceiving his hand to waver took him by the "shackle-bone," and supported his hand while he wrote the rest of his name; yet since he lived some time after signing the said will, and had so fully given directions for having it drawn in the manner it now appears, it ought to be esteemed his deed, and duly executed by him. And though there was some little variation from the testator's usual mode of spelling, indulgences of this kind ought always to be allowed to dying persons. Nor is it of any moment that the witnesses did not hear the testator acknowledge his subscription; that is only requisite, where witnesses are not present when a deed is signed: but in this case, the four witnesses heard the testator give directions to write the will, heard him approve of it when read to him, and were present in the room and saw (a) him sign, which is all that the law of Scotland requires.

The laws of all nations have agreed in this, *ut ultima voluntas defuncti fortietur effectum*, and therefore several things necessary to complete deeds *inter vivos* are dispensed with in wills, where the principal thing is the indication of the testator's purpose.

#### *Heads of the Respondents' Argument.*

In matters of this nature the law does not regard intention as sufficient, though never so carefully expressed, if that intention was not reduced to a complete and formal act. The testament in question can never be deemed to have been completed by the testator himself, since the subscription was not finished by himself, and the last part of it appears to be of a different hand, and more regularly written than the first part of it; and the name is spelled in a different way from what the testator had been accustomed to, and in the manner it is written by Watson in the body of the will. It was further not executed according to law, for though there were four subscribing witnesses, yet three of them could not positively depone that they saw the testator sign the will from his position in bed, neither did they hear him own his subscription, after it was signed; and without one of these, by the law of Scotland no will or deed can be complete. "*Si quæramus an valeat testamentum, in primis animadvertere debemus, an is qui fecerit testamentum, habuerit testamenti factionem; deinde si habuerit, requiremus, an secundum regulas juris civilis testatus sit.*" Dig. ff. L. 28. t. 1.

1681, c. 5.

Whatever favourable interpretation wills may receive, when once solemnly completed, it is absolutely necessary that the rules of law in the execution of them should be exactly observed.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal of Katherine Moniepenney be dismissed, and that the decree therein complained of be affirmed.*

Judgment,  
15 May  
1711.

For Appellant, P. King.

For Respondents, Tho. Lutwyche. James Graham.

(a) The respondents state that the witnesses did not see him sign. The fact appears from Fountainhall to have been, that they saw him take the pen in his hand, but from his position in bed Watson only saw what followed.

## Case 10.

Fountain-  
hall, 1 Feb.

1710.

Forbes,  
27 Dec.

1711.

John Crawford, an Infant, by Jane his			
Mother and Guardian,	-	-	<i>Appellant;</i>
Archibald Crawford Esq.	-	-	<i>Respondent.</i>

5th April 1712.

*Minor non tenetur placitare.*—The maxim does not take place in a reduction upon the head of dolo, or fraud in the minor's father.

*Proof.*—A deed found proved to be fraudulently altered upon ocular inspection of the different pieces, and a letter from one of the perpetrators of the fraud.

*Costs.*—40*l.* costs given against the appellant, a minor.

**T**HE parties were grandchildren of James Crawford of Ardmillan, the respondent being the son and heir of his eldest son, and the appellant the son and heir of his third son.

The respondent brought an action of reduction, improbation, and declarator before the Court of Session against the appellant, for setting aside certain deeds by virtue of which the appellant claimed the family estate of Ardmillan, and the respondent stated the circumstances of the case to be as follows:

That, the said James Crawford the grandfather in 1682, executed a deed of settlement or entail of his estate to himself in liferent, and to James Crawford (the respondent's elder brother since deceased) his grandson by his eldest son William, and the heirs male of his body in fee, whom failing to the other heirs male of the body of his said son William and the heirs male of their bodies, whom failing to Andrew Crawford his second son and the heirs male of his body, whom failing to James Crawford his third son, (father of the appellant) and the heirs male of his body, &c.: upon this deed resignation was made in the hands of the superior, the Bishop of Galloway, in September 1682, and a new charter and infeftment expedited in terms thereof.

That James the grandson, the institute in the entail, died without issue, leaving the respondent his brother under age: and Andrew the second son of the entailer also died without issue. About this time a contrivance was carried into execution by the father and the third son James to defeat the former settlement, of a singular nature: this former deed was of the hand-writing of James the son, who had been bred to the law: it consisted of three sheets pasted together, and signed at the joinings, and contained no power of revocation: but by cutting off two of these sheets and part of the third, and joining three new sheets to the said tail-piece, a deed was manufactured bearing to be to the same series of heirs as the former, but containing a power of redemption upon payment of 3*l.* Scots: in pursuance thereof, the father used an order of redemption, and, on the 10th of May 1698, executed a new deed of settlement of his estate to James his third son, and his heirs heritably and irredeemably, and upon this deed James the son was infeft in 1705,—and died in 1706, leaving the appellant his son and heir under age:

But

But the respondent Archibald, living in the house with his grandfather, by some means got possession of that part of the original deed, which had been cut off, and a letter from James the son to his father, dated in 1696, which explained the transaction: the respondent after his grandfather's death served himself heir to his elder brother deceased.

And his action concluded, that it should be found and declared, that the said original deed contained no power of redemption, that the transaction had taken place in manner before mentioned, and that the two sheets and part of the third, (then produced by the respondent,) should be added to the tail of the vitiated deed, as it had originally stood: and the respondent produced also the said letter from James the son to his father, dated in March 1696.

The appellant appeared by his mother and curatrix, and pleaded for defence to this action, that *minor non tenetur placitare super hereditate paterna*, and that it was only necessary for him to produce his father's indentment to free him from the action; but the Court finding that the maxim did not defend from the production, but reserving consideration thereof after production, the appellant produced the whole deeds called for.

The deed of 1682, being inspected and compared with what the respondent had already given into court, on the 19th July 1711 the Court "found that the two sheets and 13 lines produced by the pursuer, had been a part of and joined to the last sheet of the disposition granted by James the grandfather to his grandson James produced; and that the said three first sheets of the said disposition as it is now produced by the defender, containing a clause of redemption, have been falsely pasted to the last sheet in place of the said two sheets and 13 lines cut off; and therefore found the clause of redemption contained in one of the three sheets so pasted, null, and likewise the order of redemption used thereupon; and found the conveyance to the defender's father null; with the charter and sasine following thereupon."

And after a hearing with regard to the maxim, the Court on the 27th of December 1711 "found that the maxim of *minor non tenetur placitare super hereditate paterna* did not take place in this case."

The appellant having reclaimed against both these interlocutors, the Court by several interlocutors, (the last of them being dated the 11th of January 1712) adhered to the same.

The appeal was brought from "a sentence or decree pronounced by the Lords of Council and Session the 19th July 1711, and by them adhered to after several re-hearings, the last of which was on the 11th day of January following."

Entered,  
8 Feb. 1712-  
12.

#### *Heads of the Appellant's Argument.*

The rule *minor non tenetur placitare super hereditate paterna* is a maxim allowed by the law of Scotland, and also by the law of England. By it there is to be a stay of all proceedings against the minor, when the right of his inheritance descending from his father,

ther, who died last seized, is put in question: it is founded upon this, that a minor, is not held to have any conscience to plead in defence of his title. And in the present case, this maxim was the only defence pleaded by the appellant, or any person on his behalf.

Stair's De-  
cisions,  
vol. i.  
No. 259.

And though there be falsehood or *dolus* alleged in the present case; yet there is no falsehood or *dolus* alleged against the minor, whose privilege is insisted on, till he himself be in a capacity of pleading. If a bare allegation of such crimes be sufficient, every minor might be easily defeated of his privileges: and in the case of *Kello* against *Pringle*, 31 January 1665, it was found that the allegation of *dolus & metus* was not sufficient to take away from a minor the benefit of the maxim; and there never was any decision to the contrary.

The interlocutor of the 19th July 1711, was a determination of the matter of fact before any issue was joined, and without evidence; for nothing more was insisted upon for the appellant than his minority, and his privilege of minority was not determined until the 27th of December 1711, which was near six months after pronouncing the interlocutor.

And even if the matter of fact might have been examined into, yet it is not found, that there was any alteration of the disposition after the charter and infeftment followed thereupon, which is the substance of the respondent's libel in this action.

#### *Heads of the Respondent's Argument.*

However general the maxim pleaded by the appellant may be, yet it has known exceptions, and particularly that it never takes place *ubi agitur aut de obligatione aut de dolo defuncti*: and as this is the opinion of the most eminent lawyers, so it is most reasonable, for if a person happens to get into possession of an estate by *dolus*, and soon after dies leaving his heir a minor, it would be very hard that his minority should protect him from pleading to the action, and prevent the true proprietor from being re-possessed of his own estate, of which he was only dispossessed by the father's fraud.

The law, it is true, presumes in favour of deeds that are complete and duly executed; but this deed has no manner of pretence to that character, as appears from ocular inspection. The grain and length of the paper of the part added do not agree with the rest of the deed, and the strokes of the long letters appear upon the sheet where it was cut off. The last sheet of the deed exactly quadrates with the two sheets and 13 lines cut off.

All this was perfectly evident from the appellant's father's letter to James the grandfather, which was produced in the action, wherein the whole scheme was set out, and that the deed as it stood originally contained no clause of redemption. By this transaction a forgery was imposed upon the witnesses, who were not witnesses to the deed as it was altered, at a date as appeared by the letter long subsequent to the original execution of it.

The

The appellant alleged a declaration of the grandfather, that he being displeased with the first, had executed a new deed, on which the charter proceeded; and that his father by paying large debts was a purchaser for an onerous consideration. But the declaration of the grandfather, who appears to have been a party to the contrivance, was of no import. For the debts paid, the appellant's father took assignments in his own person; and in so far as they are just debts, the respondent will be obliged to pay them.

After hearing counsel, *It is ordered and adjudged, that the said Judgment petition and appeal be dismissed, and that the sentences or decrees therein complained of be affirmed: And it is further ordered, that the appellant shall pay or cause to be paid to the respondent the sum of 40l. for his costs in this House.* 5 April 1712

For Appellant,	<i>Ja. Mountague.</i>	<i>P. Crawford.</i>
For Respondent,	<i>Edward Northey.</i>	<i>Sam. Dodd.</i>

The letter written by the appellant's father to James the grandfather of the parties, is stated by the respondent to have been of the following tenor:

" SIR,

" I received by this bearer inclosed in your's the disposition in  
 " favour of your oye James, and according to your desire, I  
 " have by the assistance of that person you signified to me drawn  
 " it as I suppose to your satisfaction, and I have added the  
 " clause of redemption as perfectly as I think it will hold in law,  
 " and as you may dispose of your estate to any child you have  
 " notwithstanding of that tailzie. Sir, I was necessitated to write  
 " this, to know if you have any further to do in it; for I have  
 " not ended it, waiting to know your commands: and since I  
 " cannot have the occasion of this friend there, so let me know  
 " by this bearer, being a sure hand, as soon as possible. I add  
 " no more, but destroy this line, and rest,

" Sir,

" Your dutiful son and servant,

" *Edinburgh,*

" JAMES CRAWFURD."

" *March the 4th, 1696.*

## Case 11.

Fountain-  
hall, 21 Jan.  
16 Nov.  
1708.

25 Jan.

9 &amp; 18 Feb.

21 &amp; 17

Nov. 1709.

21 Jan.

3 July, and

8 Dec. 1711.

5 &amp; 16 Feb.

1712.

Forbes,

21 Jan. 1708.

21 Jan.

11 Nov. 6 &amp;

14 Dec.

1700.

15 Dec.

1710.

17 Jan. and

8 Nov. 1711.

Adam Cockburn of Ormiston, one of the  
Senators of the Court of Justice, and  
Dame Ann his Wife, - -*Appellants;*John Hamilton of Bangour, a Minor, by  
his Curators, - - -*Respondents.*

28th March 1712.

*Lis finita*.—After extracting a decret, with a reservation therein of several point, the objection of *Lis finita* and that these points were not contained in the original summons, is sustained by the Court, but reversed upon appeal.*Funeral expences*.—In a question between the heir and the assignee of the executrix of a Lord Justice Clerk, 250*l.*, being modified, as sufficient for funeral expences, the judgment is reversed.*Prescript. on*.—Furnishing to the funeral did not form such a continuation of accounts as to bar the triennial prescription of accounts incurred before the death of the deceased.*Confirmation*.—The Court having refused to allow to the assignee of an executrix in a question with an heir served *cum beneficio*, the expences of an action before them relative to the right of confirmation between the executrix and the father of the heir served *cum beneficio*, the judgment is reversed.

SIR William Hamilton of Whitelaw, Lord Justice Clerk, the appellant Ann's first husband, in 1703 executed a bond in her favour for 7000*l.* sterling, payable at *Whitsunday* or *Martinmas* next after his death. This bond was made a burthen upon his whole estate, real and personal, but not to affect the heirs of his own body. Sir William having died without issue, was buried with great pomp. His sister, Christian Dunlop, was confirmed his executrix; and the personal estate being insufficient to satisfy the claims of the widow, the executrix assigned to her the whole executry, the widow becoming bound to relieve her of the debts, funeral expences, and charges of confirmation, which last amounted to a considerable sum, a litigation having been carried on first before the commissaries, and afterwards before the Court of Session, with regard to the same, between Christian, Sir William's sister, and the father of the respondent, who was alive at Sir William's death, and his nephew and apparent heir. The respondent's father having died, the respondent was served heir to Sir William *cum beneficio inventarii*.

The appellants brought an action before the Court of Session against the respondent for what was due on the said bond, after application of the free personal estate in part payment thereof, first repaying out of such personal estate, to the appellant Ann, what she had paid to sundry creditors of the deceased, the funeral expences and expences of confirmation.

For those payments the appellants also brought an action against the executrix, in which last action the respondent appeared for his interest.

A point of law arose upon what the appellant Ann had paid to Sir Robert Blackwood and others for furnishing of goods to the deceased before his death, and also for furnishing to his funeral:

the respondent contended that these furnishings to the deceased were prescribed, three years having elapsed before they were paid: and the appellants urged, that the same parties having furnished goods to the funeral of Sir William, this prevented the running of the prescription by a continuation of accounts. The Court on the 10th of November 1709 found, "that the furnishing to the funeral of the deceased was no continuation of the currency; and therefore sustained the prescription as to the articles furnished preceding his decease."

The action proceeding as to the other points, an account of the funeral expences was given in amounting to 421*l.* 8*s.* 7*d.* to this the respondent objected as extravagant, and the Court by interlocutor on the 14th of December 1709, "reduced the same to 250*l.*" An account of the expences of confirmation was also given in amounting to 100*l.*, which being objected to, the Court by interlocutor on the 15th of December 1710, "refused to allow the expences occasioned by the action before the Court of Session, relative to the confirmation amounting to 34*l.*"

Upon those two points the appellants represented to the Court, that the extraordinary expences of the funeral, as well as of the confirmation had been occasioned by the respondent's father, then apparent heir of the deceased; and of this she offered to make proof, and the Court allowed a proof to both parties.

In the mean time the appellants with consent of the respondent petitioned the Court that after extinction of the bond debt *pro tanto* by the personal estate, which had come to the hands of the appellant Ann, decree might pass against the respondent as heir served to the deceased, for those parts of her claims which were wholly uncontroverted, not including any part of the funeral expences, or expences of confirmation; and decree was accordingly passed for 281*l.* 13*s.* 4*d.*, with a reservation in these terms, "reserving always to the pursuers, to insist for the funeral expences, and confirmation of the testament and other points not thereby determined as accords," and in these terms decree was extracted in September, 1710.

The proofs before mentioned being afterwards finished and reported, the Court by interlocutor in November 1710, "found that no action of the defender's father, to whom he was not served heir could affect him."

The respondent however when the action had proceeded thus far took up a new defence namely that there was no conclusion in the original libel against the respondent upon these points, and that by extracting the decree before mentioned *lis erat finita*; and the Court on the 29th of June 1711, "found that by the decree extracted *lis erat finita* notwithstanding of the reservation contained therein."

And afterwards on a petition for the respondents the Court on the 28th of November 1711, "allowed him to retain 250*l.* for his expences out of the heritable estate of the deceased, subject nevertheless to a proportional defalcation in case the heritage

CASES ON APPEAL FROM SCOTLAND.

" be not *solvendo*, both for debt and expences, and likewise re-  
" serving to be determined what expences are necessary and profit-  
" able in that event."

Entered as  
Jan. 1711-  
12.

The appeal was brought from " several decrees orders and  
" interlocutory sentences made by the Lords of Session, and par-  
" ticularly from the decree or sentence of the 29th June 1711."

*Heads of the Appellants' Argument.*

By the said extracted decree, the right of the appellants as to the funeral charges and expences of confirmation was expressly reserved to them; and this reservation, with the long acquiescence of the respondent, and the appellants, examining witnesses by order of the Court on these points, were a sufficient answer to the objection of *Lis finita*.

But further the appellants brought an action against the executrix of Sir William Hamilton, and her representatives after her decease, and the claims for funeral charges and expences of confirmation were a part of the process against the executrix to which the respondent made himself a party by appearing to it, and that action is not *Lis finita*.

With regard to the merchants' accounts found to be prescribed by the Court, these accounts were not only justly due by the deceased, but the same merchants having furnished goods to the funeral, within three years of the next preceeding articles in their respective accounts, it made such a currency as prevented their being cut off by the act of parliament founded on by the respondent.

With regard to the expences of the funeral: Sir William Hamilton from a small fortune, (being his father's fourth son) acquired a considerable estate; and he died not only in the character of a Lord of Session, but also of an Officer of State, as Lord Justice Clerk, leaving a competent estate and no issue, and he himself caused a former wife to be interred in the same manner except heralds before he was an Officer of State. The respondent's father; too, then living, and Sir William's apparent heir, approved of and ordered the funeral, and all the particulars claimed were paid by the appellant Anne: For these reasons the Court ought not to have restricted the funeral expences.

The expences of confirmation were all necessarily spent by the executrix in defence of her right, against the respondent's father, who first in the Commissary Court opposed the granting thereof, and not prevailing there carried the matter before the Court of Session, where after a long and chargeable contest he was forced to submit. And the appellant Anne actually paid these expences of confirmation.

The Court of Session has not only deprived the appellants of their charges and expences, but has on the contrary allowed the respondent 250*l.* for costs or expences out of the heritable estate, which was unreasonable, before the whole claims of the appellants were satisfied.

*Heads*



*Heads of the Respondent's Argument.*

The appellants having brought their action for payment of 7000*l.* 200*l.* of annuity, and 200*l.* for the maintenance of the family (nothing else being demanded), judgment was given on all these points; and the appellants having possessed themselves of all Sir William Hamilton's personal estate, they gave in an account of the amount thereof, and demanded that the same might be entirely imputed towards satisfaction of part of the said bond, and that judgment might be given against the respondent for the remainder. The Court agreed to this, and gave judgment for 2820*l.* 15*s.* against the respondent, and the decree was extracted: it only reserved a liberty to insist for funeral expences *as accords*. But this reservation can import no more, than that what is so reserved, is not deserted, and may still be sued for in due and ordinary form. This, however, can never be presumed to extend the appellants' claim, further than was contained in the action brought by them, or to entitle them to insist upon the former libel and process, wherein decree was extracted, which put an end to that suit. It might, otherwise, be in the power of a person to bring an action for one thing and after having judgment in that to *reserve* a liberty to ask another without a new libel, which would be destructive of all justice as well as form. Though there were afterwards several debates upon the subject of the funerals, yet these proceeded only upon the erroneous supposition, that the appellants had claimed the same in their libel against the respondent; and as soon as this was discovered to be a mistake it was proper to go no further.

The action against the executrix was merely collusive, and it is impossible that any sentence can pass upon that action against the respondent, because he was not cited or called to it, and his appearance to prevent collusion does not make him a party. Neither has that suit any connection with this, and therefore it can be no part of the action at the instance of the appellants against the respondent. The expences of confirmation could not regularly be brought into that action, because they were laid out by the executrix herself, and were not assigned by her to the appellant Anne, and therefore the executrix could not be sued for them. As to the funeral charges they were not in the original libel, either against the respondent or the executrix, nor could they be so, because the appellant had not paid them, (at least for the greatest part) till long after the commencement of the said actions.

By the act of parliament 1579. c. 83. it is enacted that, "all actions of debt, for housemails, &c. be pursued within three years, otherwise the creditor shall have no action except he either prove by writ, or by oath of his party." This law is very positive and plain, and howsoever it has been extended in some cases by the Court of Session, yet it never was interpreted so, as contended for by the appellants, that the furnishing to the funeral should stop the prescription established by this act especially when these furnishings were neither by order of the heir or executrix.

1579. c. 83.

1699, c. 24.

With regard to the expences allowed to the respondent,—by the ancient law of Scotland, an heir was obliged in payment of all his predecessor's debts, though ten times more than the estate descending to him; though executors were only liable so far as they had *assets*, provided they gave up an exact inventory of all the goods and effects of the deceased. This privilege, the parliament of Scotland in 1695 likewise extended to heirs: and the heir in this case was called *heres cum beneficio inventarii*, and in these terms was the respondent heir to Sir William Hamilton. The appellants having obtained judgment for 2820*l.* sterling, sued it to execution upon Sir William's heritable estate, and the respondent thereupon represented to the Court, that he being heir *cum beneficio inventarii*, was only accountable for what he had received; that he was willing to assign Sir William's whole estate for satisfaction of the appellant's demand, reserving to him so much of the said estate as would answer the expences laid out by him in managing and defending the estate. As executors had certainly an allowance for their necessary expences, and as heirs were by the said act in the same condition with them, they ought to have the same privilege; otherwise, neither heirs nor executors would put themselves to any expence to manage and defend an estate from unjust claims.

Though this claim was so reasonable, yet there never having been any adjudged case upon the point, the Court of Session proceeded very cautiously, and did not precisely determine the question of the respondent's expences, but only reserved the sum of 250*l.* provisionally as a fund for them, out of which they might allow the heir his necessary expences, if they should think that in law they ought to be allowed, and still left themselves at liberty to determine what expences were necessary; but in all probability the case will never exist, because the estate will amount to more than sufficient to pay the debts; and it was therefore unreasonable in the appellants to bring their appeal against a sentence which is not final, and does not determine the question between the parties, but is still subject to review.

Judgment  
20 March,  
1712.

After hearing counsel, it is ordered and adjudged, that the said sentence of the 29th of June (1711), declaring the suit to be *Lis finita* be reversed; and it is further ordered and adjudged, that the appellants be at liberty to insist or prosecute in the said suit or process for all the expences of the funeral, above the sum of 250*l.* to which the same were reduced by the Lord Ordinary, as well as for the said sum of 250*l.*, and as well for the extraordinary as for the ordinary costs and expences touching the administration or confirmation of the testament of the deceased, and that such several sums as shall appear just to have been allowed or deducted out of the personal estate for such funeral expences, and for such ordinary and extraordinary costs and expences touching the administration or confirmation of the said testament shall be taken as remaining due upon the bond bearing date the 5th day of March 1703, and be computed with interest from such time as the money secured by the said bond became payable until the payment thereof, and

and stand as a charge upon the heritable estate; but as to the interlocutory sentence in November 1709, for sustaining the bar of prescription, whereby the appellants were not allowed to make any deduction out of the personal estate for several of the deceased's debts paid by the appellants to Sir Robert Blackwood and others, such debts being merchants accounts and adjudged barred or prescribed by the statute of King James the 6th, as not being sued for in three years, the said interlocutory sentence is hereby affirmed: and as to the interlocutory order made the 28th of November last, touching the respondent's costs, the same is hereby remitted to the Lords of Session to reconsider the same, together with the said demands of the appellants touching the funeral expences, and the said costs and expences, touching the administration or confirmation of the said testament, and determine thereupon as shall be just.

For Appellants, Tho. Powys. Rob. Raymond.  
For Respondent, David Dalrymple. Sam. Dodd.

Part of the Judgments here reversed, are founded on as existing cases in the Dictionary vol. I. voc. *Funeral Charges*, p. 338. and vol. II. voc. *Personal and transmissible*, p. 74.

John Hamilton, of Pumpherston, Esq. - Appellant; Case 12.  
Katherine Lady Cardrofs, - Respondent. Fountain-  
hall, 20

8th April 1712.

*Minor.*—A tack sustained, which, in the recital, bore to be granted by a Minor with consent of his Curators, but was signed by the landlord only.

*Homologation.*—In a reduction of a Tack on the ground of nullity, it being found that the receipt of the rent by the Grantor's heir for more than 30 years, imported no homologation, the Judgment is reversed.

Feb. 1708.  
2 January  
1711.  
Forbes, 29  
Feb. 1708.

**I**N 1671, Sir William Stewart, of Kirkhill, the respondent's brother, let to Alexander Hamilton the appellant's father, then his factor or baillie, the lands of Strathbrock for the term of three 19 years, at the rent of about 50*l.* annually. The tack in the recital bore to be granted by the said Sir William, with the consent of his curators, but it was subscribed only by himself.

Sir William died some time after the date of this tack, but the precise date of his death does not appear. The respondent, his sister, succeeded to his estates; and the appellant's father and the appellant himself possessed their farm in virtue of the said tack, without challenge for more than 30 years; and part of the rents had been paid, (as stated by the appellant) to Sir William before his death, and the remainder regularly to, or for the use of the respondent.

In 1706 the respondent commenced an action before the Court of Session against the appellant, to remove him from the possession of the said lands, on the ground, that his tack was void being granted by Sir William Stewart when a minor, with-

out consent of his curators. And to prove the minority the respondent produced a certificate of his baptism, and several deeds executed by him, both before and after the date of the said tack, with consent of his curators, to one of which, the appellant's father was a subscribing witness; and she founded upon the tack itself, which bore consent of curators, though none were subscribing (a).

The appellant made defences to this action, and the Court on the 20th of February 1708, "sustained the nullity against the said tack, the same not being signed by the minor's curators."

The appellant having stated objections to the proof of minority, and of Sir William's being under curatory, and pleaded homologation, the Court on the 15th of July 1708, "found that the discharges for the rent did not import any homologation, acknowledgment or confirmation of the tack for the time that was to run thereof." And on the 16th of July 1708, "decerned against the defender in the removing."

Entered, 11  
February  
1711-12.

The appeal was brought from "an interlocutor or decree of the Lords of Council and Session, made on behalf of Katherine Lady Cardross, the 20th of February 1708, and of an interlocutor pronounced the 15th of July 1708, and of one other interlocutor pronounced the 16th of July 1708, whereby the appellant was decreed, to quit his possession of the lands therein mentioned."

#### *Heads of the Appellant's Argument.*

There was no direct or legal proof of Sir William Stewart's minority, which ought certainly to have been clearly proved; the certificate of his baptism could be no proof, as leaving the time of birth uncertain. Nor could deeds executed by him, with consent of his curators, be in law a sufficient proof, that he had such curators so as any deed done without their consent should be void. For there are two kinds of curators: the first are such as are legally chosen and authorized by a judge upon the minor's special choice; these curators having accepted, any deed done by the minor without their consent is void. But there are a second kind of curators, otherwise called procurators, who without any legal choice, but the consent of the minor, act as curators; but their acting does neither validate, nor does the want of their consent invalidate any deed done by the minor. It is, therefore, to be presumed, that the curators who appear to have consented to any of Sir William's deeds were of this last sort, unless it had been proved that they were otherwise legally authorized, which the

(a) The papers and vouchers produced by the respondent are stated by Forbes to have been—Certificate of Sir William's baptism in 1662; a suspension and summons in 1666, an act and commission in 1669; a summons in 1670, a charge in 1671, and a summons in 1672, all at the instance of Sir William Stewart and his curators; with a tack and factory in 1667, subscribed by him and them, to which two deeds the appellant's father was a subscribing witness, and a registered factory in 1672 executed by the same parties. She produced also a certificate under the hand of the Commissary clerk of Edinburgh, that Sir William's act of curatory stands in the minute book 8th May 1667, and a receipt for the act of curatory itself in 1671.

respondent

respondent ought to have proved, seeing *affori incumbit probatio*. Nor is the appellant's father's being a witness to the deeds in 1667 executed by Sir William and his curators any proof of the minority; for Sir William might then indeed have been a minor, and of lawful age in 1671; a witness to any deed is not obliged to know what is contained in it.—And though the tack to the appellant's father bears to be with consent of curators, and none of them sign, yet that might either proceed from this; that at the time the tack was drawn Sir William was not of age, but might be so before it was executed; or that the tenant finding they were only procurators thought their consent of no force;—and though he lived, as is agreed on all hands some time after he came of age, yet he never called this tack in question, but received the reserved rent thereof during his life (a). The tenant, then, needed not the consent of the curators to attain possession; because he had been many years possessed of the lands let; nor to validate the deed, for the first payment to the landlord did bar all exception of nullity and behoved to confirm the tack. And in the present case every thing ought to be presumed favourably for the sufficiency of the tenant.

In a reduction of this kind lesion must be proved; but though the minority had been clearly proved, yet the tack being granted at as high, if not a higher rent than before, the landlord suffered no loss by it. These lands would not answer at the appellant's father's entry, but he having ameliorated their condition at considerable expence, they came at last to be productive; but the tenant would still be a considerable loser should he at present be deprived of his tack.

As Sir William Stewart never called the tack in question during his life, so the respondent his heir who succeeded to her brother in 1674, though she knew of the tack, yet acquiesced in it till 1706, when the present action was commenced, having all the while received the reserved rents yearly and granted acquittances for the same. The appellant produced to the Court a general discharge from the late Lord Cardross, the respondent's husband deceased, dated the 26th of December 1674, for the year 1673, and all preceding, which included the rent for the first year of the tack; and this discharge mentions that an account had been made, and presumes that the vouchers for the preceding years were given up to the respondent, or to her husband. The silence, therefore, of the respondent during so long a period is an undoubted confirmation of the tack, whereof she is presumed to have known the terms and condition: and the civil law in nullities of the same kind, did not only construe such silence to be a confirmation so as to supply any defect; but Justinian by an edict, expressly declares, "that if in five years no question be moved by the grantor, nor his heir, that silence shall be held as a confirmation. Cod. L. 5. Tit. 74. And the learned Perez observes, that according to the general custom, such question must not only be

God. l. 5.  
Tit. 74.

(a) There does not appear to have been any direct proof of this averment.

moved in five years, but finally decided in ten; whereas this lease has stood unquestioned for 37 years.

*Heads of the Respondent's Argument.*

By the law and uncontroverted usage of Scotland, all deeds done and executed by minors before their full age of 21, without the advice and consent of their curators, are ipso jure null and void. And in every act and deed that is to be obligatory upon a minor, the consent of such curators must be testified by their subscribing the deed along with the minor in presence of *famous* witnesses.

By the law of Scotland a person's right of quartelling an insufficient and illegal deed is nowise cut off or weakened by delaying it, unless they let it run up to 40 years complete, which is not pretended in this case.

The respondent sufficiently proved, by the deeds and other documents produced by her, that Sir William Stewart was a minor having curators, at the date of the tack in question; and the appellant's father, then his factor, did most unwarrantably prevail upon him, without the knowledge or consent of his curators, to grant this tack for three 19 years, at a rent more than one third under the true value. This fact is evident because the appellant, having, in consequence of the decree of the Court below, been removed from the possession of the farm, the respondent granted a new tack to another tenant for a term of 11 years, at above 30*l.* per annum more rent.

Sir William never received any rent after he attained his full age of 21 years, and he died within four months after that period; and if the appellant has any discharge from the respondent for his rent, they do not mention the tack. But if they did, they cannot validate the same, being absolutely null and void.

Judgment, 3  
April 1712.

After hearing counsel, *It is ordered and adjudged, that the said interlocutors, decree, and orders complained of in the appeal, be reversed, and that the Lords of Session do order the appellant to be forthwith restored to the possession of the said lands, and to have satisfaction for what he has lost in respect of the profits of the said lands, by reason of the decree orders and interlocutors hereby reversed.*

For Appellant,	Samuel Dodd.
For Respondent,	Pat. Turnbull, Paul Jodrell, jun.

In the printed appeal cases in this question, another point is stated, which it was deemed unnecessary to detail. After the date of pronouncing the *last* interlocutor here appealed from, the appellant applied to the Court to be indemnified for certain improvements made by him and his father, and the Court found that the expences of amelioration were, *mala fide*, laid out and sufficiently compensated by a 30 years possession. But it does not appear from the judgment in this appeal, that this last mentioned part of the judgment of the Court of Session was appealed from: and the reversal upon a preliminary point renders the judgment of the Court of Session thereon of no effect. It is however stated as a precedent in the Dictionary, vol. I. voc. *Bona fide consumption*, p. 108.

William Forbes of Tolquhon, - - Appellant; Case 13.  
Alexander Forbes of Ballogie. - - Respondent. Fountain-  
hall, 2 Jan.  
1711.

10th April 1712.

*Fraud and Circumvention.*—In a reduction of sundry deeds upon this ground, various circumstances found irrelevant or not proved.

**S**IR Alexander Forbes of Tolquhon, deceased, the appellant's uncle, had various transactions and dealings with the respondent; in the course of which sundry deeds were granted by the former in favour of the latter, which form the subject of the present question.

In October 1694, Sir Alexander granted bond for repayment to the respondent of 10,000*l.* scots, which the bond recites to have been borrowed from him. On the 4th of September 1697, Sir Alexander further executed a disposition in favour of the respondent, disposing to him, his heirs, and assignees, heritably and irredeemably all his right, title, and interest in, and to the lands of Loanmay; and the deed recites, that the same was granted for onerous considerations. On the 16th of May 1699, Sir Alexander by another disposition executed by him in favour of the respondent, disposed to him, his heirs, and assignees, heritably and irredeemably all his right, title, and interest in and to the lands of Shives; and this deed also recites, that it was granted for onerous considerations. To these lands of Loanmay and Shives, Sir Alexander's own titles were not clear, there being great incumbrances upon the same. And he also by sundry deeds, conveyed to the respondent several adjudications and other incumbrances which he had upon these and other lands.

Various reports being circulated in the country respecting these transactions, Sir Alexander, on the 2d of September 1699, executed a deed ratifying and confirming to the respondent the said 10,000*l.* bond, and all his right, and title, to the said lands of Loanmay and Shives, and declaring that the dispositions thereof, were not in satisfaction of the bond, or any part thereof, but that the bond still remained due and unpaid: And further on the 7th of February 1700, Sir Alexander by another deed, did disclaim and renounce to the respondent, his heirs, and assignees, all trust which might be alleged against their rights and titles to the said lands of Loanmay and Shives. These lands had been purchased and acquired by Sir Alexander himself.

On the 4th of December 1700, Sir Alexander by a disposition executed by him, disposed to the respondent, his heirs, and assignees, heritably and irredeemably his lands of Upper Tolquhon, (being part of the family estate); and the respondent of the same date executed a back bond in Sir Alexander's favour, declaring that this disposition was made to him only as a security for such debts, as were therein mentioned, for which the respondent stood bound; and that upon payment thereof, the  
respondent,

respondent, his heirs, and assignees, would reconvey to Sir Alexander and his heirs.

On the 18th of April 1701, Sir Alexander executed an entail of his family estate, including the lands last mentioned, with the incumbrance thereon, in favour of the appellant, and certain other heirs, the respondent being one of the substitutes therein.

About this period, Sir Alexander was challenged by one Thomas Forbes of Watertown, with having made irredeemable conveyances of his estates to the respondent; but he denied the same, and entered into a written contract of wager, with this Thomas Forbes, denying that he had given irredeemable rights of his lands to the respondent, and obliging himself to pay 1000*l*. Scots, if these deeds were irredeemable, and he was to receive a like sum, if they were found to be only upon trust and security.

After this, on the 24th of June 1701, Sir Alexander executed his last will and testament, setting forth among other things, that he had granted the aforesaid bond for 10,000*l*. and disposed the lands of Loanmay and Shives, to the respondent for onerous considerations, and that he had made the disposition of the Upper lands of Tolquhon to the respondent for his security and indemnity; and he thereby appoints seven gentlemen to be curators, to the appellant, the respondent being *fine quo non*, and named the respondent and two other persons to be his executors. He died soon after on the 31st of July 1701, at the age of 77 years.

The appellant being a minor at the time of his uncle's death, when he came of age in 1706, brought an action before the Court of Session for reduction of the bond and deeds granted in favour of the respondent, as having been obtained by fraud and circumvention, when the grantor had lost his judgment, and when the respondent could not instruct the onerous considerations thereof. On these points the Court allowed the parties a joint proof, and many witnesses were examined on either side. After hearing this cause, and considering the proof adduced, the Court by interlocutor on the 2d of January 1711, "repelled the whole reasons of reduction of the writs libelled and produced, as irrelevant or not proved." The appellant reclaimed, but on the 8th of February following the Court adhered to their former interlocutor.

Entered, 13  
Dec. 1711.

The appeal was brought from "an interlocutory sentence or decree of the Lords of Counsel and Session, pronounced the 2d day of January 1710-11, and the affirmation thereof."

The qualifications of fraud insisted on by the appellant were, that Sir Alexander Forbes had had a free estate of £10,000 Scots *per annum*; but that before his death, being old and infirm, he gave himself up to the management of the respondent and a housekeeper; and though he lived penuriously, he contracted in that period great debts, and executed in the respondent's favour the deeds before mentioned: that it appeared from the contents of these deeds and the contract of wager that he was ignorant of their import: that, by the respondent's means, the letters of his relations were kept back, and access denied to them; that his memory and judgment were de-  
cayed



cayed in so much that he did not know his oldest friends : that he would have craved his tenants for rents paid only the day before, &c.

The respondent answered, that the deeds bearing to be for onerous causes proved their recitals, unless the contrary was proved: that Sir Alexander was short sighted, of a very peculiar humour, and always craved his tenants for rent when he saw them: that the appellant's witnesses were persons of inferior degree, but that the respondent had proved by noblemen, gentlemen, and other persons of probity, that Sir Alexander conversed with them as rationally as ever, during the period in question.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the sentence or decree and the affirmance thereof complained of in the said appeal be affirmed.*

Judgment,  
10 April,  
1712.

For Appellant. *Edward Northey, Sam. Dodd.*

For Respondent. *Robert Raymond, David Dalrymple.*

William Dunbar, second Son of Sir William

Case 14

Dunbar of Durn, - - - - - *Appellant;*

Colonel John Erskine, - - - - - *Respondent.*

16th May 1712.

*Act of Parliament 1693, c. 9.*—The accounts of a magazine keeper, taken and verified in terms of this act, need not be verified anew before the Court of Session.

*Expences.*—Expences of the Court below given against a Respondent.

THE Privy Council of Scotland, in 1690, by a proclamation ordained the Commissioners of Supply to furnish forage for the forces, then stationed in the several counties, to prepare magazines for keeping the same, and to appoint the Collectors of Supply to be magazine keepers. The appellant was Collector of the Supply and magazine keeper, for the county of Banff.

More money having been advanced in some parts of the kingdom for forage, than was due on account of the supply, in 1693, an Act of Parliament was made for discharging the same, and the method of proceeding and determining upon claims was laid down by that act. 1693. c. 9.

In consequence thereof applications were made to a committee of the Privy Council, on behalf of the freeholders of the county of Banff, and by the appellant who gave in a claim for 1727*l.* 3*s.* 10*d.* Scots, due to him as magazine keeper. There being some difficulty in settling the proportions due to the several freeholders of the county for their furnishings, Sir James Abercromby and Mr. Duff, their two representatives in parliament, to whom they had given authority to act for them, assigned and made over the whole arrears, due for the county of Banff, to the respondent, amounting to the sum of 6200*l.* Scots, in which was included the 1727*l.* 3*s.* 10*d.* claimed by the appellant with a power to receive the same.

The

The respondent solicited this business before the Privy Council; and among other claims, that standing in the name of the appellant, was approved of by the Committee of Privy Council, who had the examination of the same. After a report made by their Committee, the Privy Council on the 5th of December 1695, recommended to the Commissioners concerning the *Poll-Money*, appointed by the said act 1693, to make payment, among others, to the appellant of the said sum of 1727*l.* 3*s.* 10*d.* out of the Poll-Money. On the 6th of January 1696, these Commissioners did upon the said act of Privy Council, indorse their precept or bill directed to George Baillie of Jerviswood, then receiver general, "to pay out of the Poll-Money to Lieutenant Colonel John Erskine the sum of 1727*l.* 3*s.* 10*d.* contained in the within act, for the use and behoof of William Dunbar, magazine keeper in Banff." And the respondent gave his receipt for the same, under the precept.

The respondent also received the other arrears due to the county of Banff, and he accounted for the whole sum to Sir James Abercromby and Mr. Duff before mentioned, who again paid to, or accounted for, the whole sum to the Commissioners of Supply for the county, including the 1727*l.* 3*s.* 10*d.* which had been stated in the appellant's name; and these Commissioners on the 19th of March 1700, granted a discharge to Sir James Abercromby and Mr. Duff, and obliged themselves to warrant them from all actions that could be brought against them on that account.

In 1704, the appellant brought an action against the respondent, before the Sheriff of Edinburgh, for payment of the money received in his name as aforesaid; the respondent made objection to the jurisdiction of the Court, but the Sheriff gave his decree against the respondent, for the said principal sum of 1727*l.* 3*s.* 10*d.* with interest and 120*l.* Scots of expences. In these terms the decree of the Sheriff was extracted, and a horning thereon executed against the respondent.

But the latter afterwards presented a bill of suspension to the Court of Session, and on the 26th of February 1706, the Court, "found the letters orderly proceeded, and decerned the same to take effect, and to be further proceeded in, until the respondent should pay to the appellant 1727*l.* 3*s.* 10*d.* of principal with interest from January 1696; but suspended the execution as to the expences, simpliciter: and of consent of parties procurators sisted all execution upon the said decret, till the Lord Ordinary should give orders in writing for doing diligence thereon, and allowed the suspender to retain in his own hands, 200 merks Scots paid to the charger by Alexander Duff, who was cautioner for the suspender in the suspension;" and in these terms the decret was extracted.

The sif having been made upon the idea of an accommodation between the parties, when that was laid aside, the appellant applied to the Lord Ordinary, to have the sif taken off, and after sundry proceedings, and a hearing in presence, the Court on the

3d of January 1708, "declared they would hear the matter upon the material justice of the cause, and remitted it to the Lord Ordinary to hear and determine, or report."

The Lord Ordinary after hearing parties, ordered the proclamation concerning the keeping of magazines and furnishing of troops, and the books kept touching the same, and also the account of furnishing, and losses for the shire of Banff, concerning the said furnishing stated and approved by the Privy Council, with their order upon the Commissioners of the Poll-Money, to be produced by the appellant. The appellant opposed this production, and after a report from the Lord Ordinary, the Court on the 15th of July 1709, "found that whoever did furnish provisions and provide magazines for the forces, and instructed the same in terms of the act of Parliament, ought to have the money pursued for; and remitted it to the Lord Ordinary to hear the parties upon the point of furnishing the provision and magazines, and to determine or report; and in case the parties contenders could not instruct the furnishing and providing, ordain the money to be assigned in the clerk to the process hands."

And on a reclaiming petition with answers, the Court on the 26th of July 1709, "found that the said decree was no definitive sentence, and adhered to their former interlocutors, with this quality, that regard ought to be had the charger's expences in managing the magazine."

The appeal was brought from, "a decree of the Lords of Council and Session, made on or about the 26th day of February 1706, and an interlocutory order in the same cause, on or about the 15th day of July 1709, for stay of execution upon the said decree." Entered  
January 17,  
1711-12.

#### *Heads of the Appellant's Argument.*

The appellant's account for forage truly supplied by him, was stated to and allowed by the Commissioners of Supply; and it was afterwards revised, verified, and approved by and before the Committee of the Privy Council, and the Lords of the Privy Council, who by the said act 1693, concerning the Poll-Money were empowered, and had authority to decide and determine finally all questions and difficulties, which were by the same act undetermined, or which might arise touching the matters therein mentioned, approved of the report of their Committee, and what they did was pursuant to the authority given by parliament. The Court of Session therefore had no authority to decree any account to be taken touching the said magazines and provisions; the decree extracted in this case was a definitive sentence, according to the articles of regulation concerning the Session, pursuant to an act of parliament in 1693, entitled *Commission for regulation of Judicatories*. 1693. c. 34.

The respondent, in receiving the money in question was a trustee for the appellant and had no manner of interest therein, nor any just reason to withhold the same from the appellant, which he hath done above 16 years, and hath occasioned the appellant's  
6 spending,

spending, in charges relating thereto, more than the said money decreed to him.

*Heads of the Respondent's Argument.*

The appellant himself never furnished any corn or straw towards the said magazine, but being keeper of the books of furnishing, instead of stating the accounts for furnishing, as due to the shire, or to the several furnishers, he stated them as due to himself; and the respondent received the money from the receiver general, in consequence of an assignment made in his favour by the representatives in parliament for the county of Banff, and not in virtue of any authority from the appellant himself.

The fist which was agreed to by the consent of both parties, ought not to have been taken off, till a fair account were taken; it being unreasonable that the appellant's word only should be taken instead of regular and proper vouchers; which vouchers if he could produce would certainly be allowed, but it would be most unreasonable, that because the appellant who had the books in his own hands, and made up the accounts in his own name, though he had not furnished any thing, should by such means deprive the freeholders of their right who had actually furnished the same, and in truth and fact, if the appellant is obliged to produce vouchers for his furnishing it will appear plainly, that he had none, or at least very small interest in this money, and never was any money out of pocket in furnishing or providing corn and straw for the magazine, the same having been really furnished by the freeholders of the county.

Judgment,  
16 May  
1712.

After hearing counsel, *It is ordered and adjudged, that so much of the said decrees orders and interlocutors, as are complained of in the said appeal, and made in this cause, whereby the appellants execution was stayed, be reversed and set aside; and that the Lords of Council and Session in Scotland, do order execution to be forthwith issued for the sum of 1727l. 3s. 10d. scots money decreed to the appellant William Dunbar and for 120l. scots money costs, decreed to the appellant by the Sheriffs of Edinburgh, and that the Lords of Council and Session do also forthwith order interest to be computed and paid for the said sum of 1727l. 3s. 10d. scots money, for the time the same came into the hands of the respondent Erskine, until the same shall be paid back to the appellant, and also that the appellant shall have his full costs for all his subsequent proceedings before the said Sheriffs, and Lords of Council and Session, since the taxation of his costs by the said Sheriffs, and that execution be also forthwith issued for such interest, and subsequent costs, after discounting of the sum of 200 merks paid to the appellant by Alexander Duff, and mentioned in the decree by the said Lords of Council and Session, and that the said Lords of Council and Session do order the same to be done accordingly.*

For Appellant,  
For Respondent,

*P. Crawford, Ro. Forbes.  
Rob. Raymond, P. King.*

Sir Patrick Home, Baronet, - - Appellant; Case 15.  
Sir Robert Home, Baronet, - - Respondent.

*Et c Contra.*

27th May 1712.

*Fraud and Circumvention.*—Circumstances sufficient to reduce deeds upon this ground. Being so reduced they stand as a security only for the onerous causes thereof.

*Inhibition.*—By marriage contract the husband is bound to resign the estate to himself, and the heirs male of the marriage, and inhibition being used thereon he was disabled to dispose of that estate gratuitously, in prejudice of the heir male of the marriage.

*Representation.*—This heir male being served *Hæres masculus et provisionis* to his father is found liable by the Court to warrant his father's deeds, but the judgment is reversed.

*Trust.*—A second Son having accepted from his Father a tack of the estate for payment of debts and having afterwards taken a disposition of that estate from his elder brother, the trustee is obliged to count and clear the onerous cause of this disposition, at the suit of the son of the said elder brother, (whom the Court had found to be *heir-male*.)

Fountain-  
hall, 24  
June, 1 Dec.  
1698. 18  
January, 5  
July 1699.  
7 July 1702.  
10 Feb. 17,  
July, 17,  
Dec. 1708.  
21 Nov.  
1711.  
Forbes, 16  
July, 1708.

SIR John Home of Renton, Baronet, deceased, had two Sons, first Alexander, (afterwards Sir Alexander) the father of Sir Robert, party in these appeals, and second Patrick, (afterwards Sir Patrick) the other party therein.

On the 30th of September 1670, Sir John executed a settlement or entail of his lands and estates, upon his eldest son and the heirs therein mentioned; but not having been registered, and no infeftment having been taken thereon, it was after Sir John's death cancelled or destroyed by his son Sir Alexander; and the precise terms of it are not agreed upon by the parties. On the 6th of October thereafter, Sir John executed a disposition or conveyance of his whole unentailed and personal property to his said son Alexander, upon the following recital. "And seeing by disposition of tailzie dated the 30th of September last, I have disposed my lands, &c. to Alexander Home my eldest son, &c. therefore wit, ye me, for the better and more effectual payment of my debts, that my lands, living, and estate may be disburthened of the same, to have given, granted, and disposed to the said Alexander Home, with the reservations, conditions, and limitations after mentioned;" then follows the enumeration of the particulars conveyed, and the conditions of the conveyance, that Alexander Home should be bound by his acceptance to sell such part of the subjects conveyed, as consisted in lands appraised, or taken in execution for debts, and also such part thereof as consisted in moveables, and to do exact diligence for recovering debts due to Sir John, and to apply the price of subjects sold, or money recovered within year and day after Sir John's death in payment of debts, and that the said Alexander Home should have no power to dispose of any part of the said entailed estates, till the unentailed and personal estate was sold, and applied for payment as aforesaid; and Alexander was further disabled

disabled from disposing of the said personal and unentailed estate, or any part of it otherwise than as aforesaid, or to do any deed, whereby it might be affected or evicted; and if the said Alexander should act contrary thereto, then his right was to become void, and the right of the whole was to devolve on Sir Patrick, for the same ends and purposes.

On the 13th of May 1671, Sir John further executed a lease of his entailed estate, in favour of his second son Sir Patrick, who was then an advocate, expressing the cause to be for payment of his debts, and children's portions, that his entailed estate might be disburthened, to commence from the next term after Sir John's decease, and to continue five years, and so from five years to five years, till the whole of the debts and portions should be paid; the said Sir Patrick paying yearly to Sir John's relict 88*l.* 17*s.* sterling, to Alexander the eldest son 111*l.* 2*s.* sterling, and applying the surplus for payment of debts and children's portions; and Sir Patrick was thereby bound to count and reckon yearly for his intromissions, at the sight of Charles Maitland of Hatton, afterwards Earl of Lauderdale, and George Home of Kaimes, Sir John's brother. Sir Patrick was thereby also to have deduction of what expences he should be at not only in managing the said entailed estate; but also all charges and expences which he should be at in pursuing or defending any action or plea at law on account of the said estate, or in pursuing or defending any action competent to, or that might be moved against Sir John's heirs, and successors.

Sir John died soon after in July 1671, and Sir Patrick entered to possession of his landed estate, by virtue of the said lease. On the 28th of August 1671, Sir Alexander by a deed in which Sir Patrick joined him, conveyed the bulk of the unentailed and personal estate, consisting of an apprising upon the estate of John Renton of Lammerton, for the sum of 1243*l.* sterling principal money, 1800 sheep, 280 lambs, 50 oxen, 25 milk cows, 3 bulls, 10 calves, 21 horses, 50 bolls of wheat, 110 bolls of barley, and 310 bolls of oats, to the said George Home of Kaimes, in security to him of a certain debt due to him, and for his relief from certain other debts, wherein he was cautioner, for and with the said Sir John Home.

Disputes arising between the brothers Sir Alexander and Sir Patrick, Sir Alexander in 1673 brought an action of count and reckoning against Sir Patrick before the Court of Session; and after various proceedings in that action, the Court on the 23d of December 1675 allotted part of the estate to Sir Alexander, for payment of his annuity, and ordered the count and reckoning to proceed.

On the 27th of April 1678, a contract was executed precedent to the marriage of Sir Alexander Home, with Margaret the daughter of Sir William Scott, then deceased, whereby in consideration of that marriage and of 10,000 merks, the portion of the said Margaret Scott, Sir Alexander obliged himself to settle an annuity of 2090 merks, out of the said estate upon his lady, and

to settle the lands, and basonies belonging to him, upon himself and the heirs male of that marriage. And on the 21st of July 1690, a settlement to that effect was executed by Sir Alexander with concurrence of the persons named in the contract of marriage, at whose instance execution was appointed: this settlement was registered, and inhibition served thereon against Sir Alexander.

The action of Court and reckoning mean time proceeded without intermission, and in July 1694, when it had already lasted 21 years, Sir Patrick was not brought to a final account: but the rental of the estate and all other proofs being made and considered, the Court remitted the account to be stated by the Lord Ordinary in the cause, in order to their final decree.

While masters remained in this situation on the 31st of October 1694, just before the Session began, Sir Patrick procured from his brother Sir Alexander a disposition whereby he sold and disposed to Sir Patrick, his heirs, and assignees, his whole lands and estate, and discharged him of all his intromissions therewith; and Sir Patrick by acceptance thereof became bound to pay certain debts therein particularly mentioned, and all other the debts of the said Sir John Home, and Sir Alexander reserved his own life-rent of part of the estate. Of same date, Sir Alexander executed a separate discharge to Sir Patrick, of his whole intromissions in virtue of the said lease and otherwise, proceeding upon the recital that Sir Patrick had rendered a just account thereof to Sir Alexander.

Sir Alexander's lady, and her son Robert then a minor, as creditors by the marriage contract, within a very short space after the date of these deeds, made an application to the Court of Session to set aside the same as procured from Sir Alexander, a man weak and unfit for business, by fraud and circumvention, and in prejudice of the heir of the marriage whose right could not be defeated by Sir Alexander's gratuitous deeds; but in this they did not succeed.

Sir Alexander died upon the 27th of May 1698, and after his death his son Sir Robert, (party in the present appeals) being still a minor, by his curator brought an action against Sir Patrick before the Court of Session to waken the former action of count and reckoning, and to reduce and set aside the said disposition and discharge of the 31st of October 1694, upon the said ground that they had been fraudently obtained from Sir Alexander without any onerous cause, and that Sir Alexander by his marriage contract being obliged to resign his lands in favour of himself, and the heirs male of the marriage upon which inhibition had been used, he could make no gratuitous disposition and discharge to Sir Patrick in prejudice of the heir male of the marriage. The Court on the 12th of January 1699, allowed a probation to either party on the following points: viz. To the said Sir Robert Home, for proving the qualities of fraud and circumvention, and to the said Sir Patrick Home for proving his defences to take off the said qualities, and also to the said Sir Robert for proving the rental, casualties and value of the estate

Appealed  
from by Sir  
Robert.

and the time of Sir Patrick's intromissions with the rents thereof, and the compositions obtained by him from creditors; and to Sir Patrick for proving the debts affecting the estate disposed to which he had acquired right, and which were undertaken to be paid by the disposition thereof, together with the publick burdens and other legal deductions from the said estate. Witnesses and other proofs were adduced, and the Court on the 10th of February 1708. "Having advised the debate and testimonies "adduced and writs produced, and founded on for either party, "found the onerous cause and valuable consideration of the "foresaid discharge and disposition granted by the said Sir "Alexander Home deceased, to Sir Patrick Home in 1694, "and produced in this process, sufficiently instructed to free "Sir Patrick from fraud and circumvention."

Appealed  
from by Sir  
Patrick.

Against this interlocutor Sir Robert reclaimed, particularly insisting upon his father's marriage contract and inhibition thereon; after a hearing the Court on the 16th of July 1708, "found "that the obligation in the said contract of marriage betwixt "the said Sir Alexander Home and Dame Margaret Scott his "Lady, whereby the said Sir Alexander is bound to resign the "estate in favour of himself, and the heirs male of the marriage, with the inhibition raised thereon, did disable him to "dispose of that estate gratuitously, in prejudice of Sir Robert "who was heir male of the marriage."

Sir Patrick reclaimed, insisting that Sir Alexander Home was, by the clause in the marriage contract, heir and might dispose of the estate; and further that Sir Robert was served heir male general to his father and so obliged to warrant all his father's deeds, and consequently could not call in question the said disposition and discharge. The Court heard parties in their own presence upon these points: viz. "Whether by the retour Sir "Robert be heir of provision only, and not liable to warrant "his father's disposition in favour of Sir Patrick, as being contrary to the provision in Sir Robert's father's contract of "marriage; or if heir male also, and thereby liable to warrant "his father's disposition." The brief upon which the services proceeded, bore that the person to be served was heir of provision, the retour run in these words, "*hæres masculus et provisionis quondam Domini Alexandri Home, virtute contractus matrimonialis confect. inter dictum Dominum Alexandrum et Dominam Margaretam Scott de dat. 27 Aprilis 1678, per quem contract. dictus Alexander obligavit se, &c. providere totas et integras terras et baronias de Renton, &c. in favorem dicti Alexandri & hæredum masculorum tunc procreand. inter illum et Dominam Margaretam*" &c. The cause being heard on this matter the Court on the 17th of December 1708, "Having "advised the debate with the retour and other documents in "process, found Sir Robert Home was served not only heir of "provision, but also heir male general." And to this interlocutor the Court adhered on the 5th of January 1709.

Appealed  
from by Sir  
Robert.

Appealed  
from by Sir  
Robert.

Sir



Sir Robert afterwards insisted upon a new ground: viz. "That Sir Patrick having accepted of the lease of the said lands from the said Sir John Home deceased he became thereby a trustee for the use of the said Sir Alexander Home; and that therefore Sir Alexander could not grant, nor Sir Patrick accept of the said disposition or discharge." After a hearing the Court on the 12th of January 1709, "found that the respondent as heir or otherwise representing his father Sir Alexander, is not obliged to warrant the disposition of the lands to Sir Patrick Home, or discharge of intromissions by virtue of the lease or omissions; but found that Sir Robert Home by virtue of Sir Patrick's accepting of the said lease, may quarrel the said disposition and discharge, in so far as the same was not granted for an equivalent onerous cause." And this interlocutor was adhered to on 27th of January thereafter: And the Court on the 11th February 1709, "found that Sir Patrick was obliged to count and clear the valuable consideration for which the said discharge and disposition were granted." On the 17th of July 1711, the Court did for that purpose refer the said account to the Lord Ordinary to be audited by him.

Appealed  
from by Sir  
Patrick.

Appealed  
from by Sir  
Patrick.

Upon Sir Patrick's petition, the cause was reheard, and the Court on the 20th of November 1711, "found that Sir Robert Home was not bound to warrant his father's disposition or discharge, but that he might controvert the same, in so far as not granted for valuable considerations, and therefore ordered Sir Patrick to account before the Lord Ordinary in the cause."

Appealed  
from by Sir  
Patrick.

The original appeal was brought from "several interlocutors or decrees of the Lords of Council and Session pronounced the 16th of July 1708, the 12th January 1708-9, the 11th of February 1708-9, the 17th of July 1711, and 20th of November 1711, on behalf of Sir Robert Home Baronet."

Entered, 18  
January  
1711-12.

And the cross appeal "from several interlocutors or decrees pronounced by the Lords of Council and Session the 10th of February 1708, the 17th of December 1708, and the 5th of January 1709."

Entered, 8  
April 1712.

#### *Heads of Sir Patrick's Argument on the Original Appeal.*

It could be no breach of trust in Sir Patrick with respect to Sir Alexander, to accept of an absolute conveyance of the premises from Sir Alexander, because he being entitled to the reversion after the trust of the lease discharged, might dispose of the lands as he thought fit; nor with respect to the creditors in whose favour the lease was made, because all their debts were satisfied and paid and they do not complain.

By the interlocutor 12th January 1709, Sir Alexander might have sold the estate to Sir Patrick for an onerous consideration; and by the interlocutor of the 10th of February 1708, the Court found the onerous consideration of the purchase proved: and such onerous consideration appears upon the very face of the disposition, for there the debts due by Sir John Home and Sir

Alexander are recited, and all these debts together with the rental of the estate were under the view of the Court, when they found the onerous consideration sufficiently instructed.

Sir Alexander to whom Sir Patrick was made accountable by the lease having in his lifetime commenced an action against Sir Patrick for such account, and having, after the same had depended before the Court of Session from 1675 to 1694, given Sir Patrick a full and general release and discharge for all the rents received by him, in which it is declared, that Sir Patrick had made just account and reckoning for the rents received by him by virtue of the lease, Sir Robert ought not now to be admitted as heir to his father to controvert the same.

*Heads of his Argument on the Cross Appeal.*

(Sir Patrick denies the alleged facts, that Sir Alexander was a weak man, and imposed upon: he allows that he entertained apprehensions of witches, but states that many good men had similar notions, and that several people of late had been executed in Scotland for witchcraft.)

The deed of entail alleged to have been executed by old Sir John is not extant or exhibited in the cause, so that no argument could be brought from it: and no entail could be made but with the burden of the grantor's debts. If any such entail were made it was cancelled by Sir Alexander, as he acknowledged upon oath before the commencing of any action against Sir Patrick, and so the terms of it cannot be known.

Soon after the date of the foresaid disposition and discharge, Sir Robert and his guardians applied to the Court of Session, to have the same set aside upon the same grounds, which he afterwards insisted on in the present cause. But the Court by three several interlocutors or decrees on the 14th of November 1694, the 4th of December thereafter, and the 13th of November 1695, refused to admit the said reasons, and dismissed the action: and these decrees are not appealed from.

The onerous cause of this purchase appears upon the very face of the deeds; In these the rent of the estate, amount of debts and reserved annuities are particularly set out; it was evident, that a fund could not be raised from the rents to pay the annual burdens, and discharge the debts. Several creditors also had adjudged, and, but for Sir Patrick's interference, would have carried off the estate.

With regard to Sir Robert's service, the Court in considering this point, called for the whole papers relating to that service, all which expressly bear Sir Robert to be served *heir male and of provision*. The claim given in to the jury bears expressly that he claims himself to be served heir male and of provision: and the depositions of witnesses adduced, prove that he is heir male and of provision; and the verdict of the jury bears the same, as does the extract of the retour from the Chancery which is the conclusion of all. What was alledged by Sir Robert in the

Court

Court below, that it was only a mistake of the clerk in adding the particle *et* between the words *masculus* and *provisonis* in the retour; and that the brieve which was the warrant of the service bore only *heir of provision* and not *heir male*, is of no moment. For the brieve is only a short piece of form in two or three lines, for a warrant to summons the jury, which passes of course; and it is never regarded how the party is designed there, seeing the same jury serves all different sorts of heirs. When once the jury is met, the party has it still in his option to explain himself by his claim or petition, as to the nature and kind of heir he designs to be served. And it cannot by law be admitted to allege, that after a writ is recorded, the same is false by a pretended mistake of the clerk.

And further Sir Robert oftner than once designed himself heir male in the Court below; and being heir male he is consequently bound in warrandice, which is so certain a principle in the law of Scotland, that Sir Robert has not appealed against the interlocutor of the 2d of December 1708, on that head.

*Heads of Sir Robert's Argument on both Appeals.*

(Sir Robert in return details the different facts inferring imbecility on the part of his father, and lesion towards his father and himself; but these facts cannot be stated with precision from the appeal cases.)

With regard to the retour, the word *et* between *masculus* and *provisonis* was inserted during Sir Robert's minority by a mistake of the clerk, and ought not to be made use of to his prejudice. For 1st. The brieve or warrant, which regulates the retour, was only to serve him heir of provision. 2d. The action was brought by Sir Robert expressly as heir of provision, and Sir Patrick for many years answered on that title; and 3d. There was no inheritance in which Sir Robert could succeed to his father as heir male general.

Sir Robert humbly hopes, that after such sinister practices used by Sir Patrick to defeat the wife and just provisions of his father, to circumvent a weak brother, to deprive the creditors of their just debts, and Sir Robert his nephew of his whole inheritance, and even to reduce him, his wife, and children to beggary, (he having no other estate than what depends on the event of this action) and as nothing more is required of Sir Patrick than that he should come to a fair account that the house will reverse the decrees or interlocutors appealed from by Sir Robert, and set aside the said disposition and discharge on which they were founded, and affirm the decrees or orders appealed from by Sir Patrick with exemplary costs.

After hearing counsel, *It is ordered and adjudged that the several decrees or interlocutors complained of in the appeal of the said Sir Patrick Home be affirmed, and that the said petition and appeal of the said Sir Patrick Home be dismissed; and that the several decrees or interlocutors pronounced the 10th of February 1708, the 17th of*

Judgment,  
27 May,  
1712.

*December 1708, and the 5th of January 1709, complained of by the said Sir Robert Home, in his said petition and appeal be reversed: And it is further ordered and adjudged that the release or discharge, and the grant and disposition made by Sir Alexander Home, to the said Sir Patrick Home, complained of by the said petition, and appeal of the said Sir Robert Home having been gained by fraud and circumvention, be so far reduced and set aside as to stand a security only for any onerous cause, or valuable consideration paid, or made good by the said Sir Patrick Home for the same, and that the said Sir Patrick do account for the rents and profits of the trust estate granted to him by Sir John Home by lease the 13th May 1671; and for all other sums of money, debts, or moveables contained in the aforesaid discharge and disposition which belonged to the said Sir John Home, and were received by Sir Patrick Home, and which ought to have been applied for the debts charged upon Sir John's estate; and he allowed on such account what he really and bona fide paid or expended in the just execution of the trust expressed in the said lease, or as the onerous cause or valuable consideration of the said discharge and disposition of the said Sir Alexander to the said Sir Patrick.*

For Sir Patrick,	<i>Edw. Northey. Sam. Mead.</i>
For Sir Robert,	<i>Thos. Powys. Rob. Raymond.</i>

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The decision of the Court of Session on the point of *representation*, though here reversed, is founded upon in the Dictionary vol. II. hac voce, p. 345. Indeed, as the Court of Session afterwards ordered Sir Patrick to clear the onerous cause of the deed on account of the trust, their judgment on the point of the representation was virtually done away and being therefore but interlocutory ought not perhaps to have been stated as an existing decision.

Alexander Robertson Esq. of Strowan,      *Appellant* ;      Case 16.  
Margaret Robertson, his Sister,      *Respondent*.      Fountain-

hall, 12  
Feb. 1712,  
Forbes, 22,  
Feb. 1712.

4th June 1712.

*Provision; to Children.*—A mother being put in possession of part of her eldest Son's forfeited estate for aliment to younger children, in a question with the Son after the estate restored, it is found that her intromissions, above the current interest of their portions, went in discharge of former interest due thereon and of current interest, but not in payment of principal, or of interest after the intromissions ceased.

*Battery pendente lite.*—Circumstances inferring this crime: though decrees taken in the civil action, recourse might also be had to the penal: the pains of battery not remitted by an act of general indemnity.

*Costs.*—40*l* given against the appellant.

**B**Y contract of marriage in August 1663, between the father and mother of the appellant and respondent, the father bound himself, his heirs, executors, and successors to pay to the younger children of the marriage 10,000 merks scots among them for their portions at Whitfunday or Martinmas next after they should attain their ages of 15 years. The issue of this marriage were the appellant, the respondent, and three younger children.

The respondent attained her age of 15 years, on the 18th of May 1681, but before she had received any part of the interest or principal, her father died in November 1688, and her brother the appellant soon after went beyond seas, and became *forfeited*, and all his paternal estate was seized by their then majesties. The younger children being thus left destitute, application was made to the Privy Council to have some part of the estate of Strowan allotted to the mother for their maintenance; and on the 5th of February 1691, the Privy Council, by an act allotted the saw milln of Strowan, with as much of the wood growing on the estate of Strowan as was accustomed to be sawed and wrought, and the whole profits and casualties thereof, and services thereto belonging, for the maintenance of the younger children during their pleasure, appointing the said profits, casualties, and services with the pertinents thereof to be paid and performed to their said mother, for her said children's aliment, during the Council's pleasure, upon her receipts and discharges which should be sufficient to exonerate the payers thereof.

The mother and children continued in possession till 1704, when the appellant having returned to Scotland, his estates were restored to him. In 1708, the respondent brought an action against the appellant before the Court of Session, for payment of her portion being one fourth part of the said 10,000 merks scots, with interest since 1681, when she attained her age of 15 years.

In this action the appellant pleaded, at first that he had no part of his father's estate either as heir, or by other passive title, but that his intromissions were by other singular titles, and that

he was not liable to pay the said portions; but after examining sundry witnesses on this point, the Court on the 15th of June 1711, found the passive titles proved, and the defender to be liable. The appellant then took another defence, that the portions of the younger children were more than fully paid principal and interest by their receipt of the profits, &c. of the said saw-mill; and the respondent contended that such receipt was merely in consequence of a gift to the mother for maintaining the younger children from government, and was not to be imputed in payment of the principal or interest of their portions: after sundry proceedings in this action and a proof of the intromissions allowed, the Court on the 20th of July 1711, "found that during such time as the pursuer was maintained by virtue of the act of Council out of the defender's saw-mill, there could be no interest due to her for her said portion; but suspended the determining how far the pursuer's super-intromissions should extinguish her said portion, or the interest thereof after the defender's entry, till the proofs of her intromissions came to be considered."

Sundry witnesses were examined with regard to the profits of the saw-mill, and the pursuer's intromissions therewith, and the cause being afterwards heard, the Court on the 29th of December 1711, pronounced the following interlocutor, "The Lords having considered the debate with the state of the process and probation, find that the super-intromission above the interest of 10000 merks, being the younger children's portions during the mother's possession, was not only imputable to the payment of interest during that intromission, but to the payment of the former interest thereof, from the father's decease to the mother's possession, by the act of Council, but found that the super-intromission was not to be imputed in payment of any part of the principal sum or interest since she ceased to possess, and found that the intromission continued till Whitunday 1704, and therefore decreed to the pursuer her said portion with interest from that time." Against this interlocutor the appellant reclaimed, but on the 9th of January 1711-12, the Court adhered to their former interlocutor.

While this action was in dependance the respondent presented a petition to the Court setting forth, that since the commencement thereof, in April 1709, the appellant with a design to force the respondent to relinquish her just right to her portion, and to give him a discharge, did cause her to be seized on a Sunday by eight men armed with swords, pistols, and guns, and carried as a criminal five miles to the appellant's house at Cary, from whence she was by his command dragged away to his miller's house, and there kept prisoner with centinels till she made her escape; and therefore she prayed that, pursuant to the act of parliament 1594. c. 219., the appellant should be decreed to pay the respondent her said debt, damages, and expences. The appellant made answers, and the Court allowed a proof of the matters of facts. A proof was taken accordingly in this matter, and reported to the Court, but before procuring judgment thereon,

the

the interlocutor of the 29th of December 1711, was pronounced. The respondent after this, petitioned the Court to take the proof of the said invasion into consideration; to this the appellant made objections, that it was now incompetent as she had taken decree in the civil action, and that the penal action was remitted by the late act of indemnity. These objections were repelled, and the Court on the 22d of February 1711-12, found the complaint "proved in terms of the act of parliament, and therefore decerned the defender to pay to the pursuer the whole debt libelled with expences."

The appeal was brought from "an interlocutor or decree of the 29th of December 1711, and several subsequent interlocutors."

Entered,  
4 March  
1711-12.

*Heads of the Appellant's Argument.*

This provision to the respondent being constituted by the mother's contract of marriage, whereby the mother had an interest to see to the payment thereof, the respondent's petition to have her mother put in possession of a part of the appellant's estate for that end can receive no other reasonable construction, but that the same was done for the full satisfaction both of principal and interest of these provisions contained in the contract of marriage expressly referred to in the application to the Privy Council.

By act of parliament in Scotland, no part of any forfeited estate is to be gifted away, and so long as there remains any debts upon the same, the profits of the estate must be applied in the first place in discharging these debts; and had not this part of the estate been so applied for the use of the respondent, and the other younger children, it would have been applied in payment of other debts, and would have extinguished them.

Besides it plainly appears, that the Privy Council were deceived in the value of this grant; for the respondent applied to the Privy Council, that her mother might be put in possession of that part of the estate for an aliment to the respondent, and the other children in the first place, with an order to the factor upon the said estate, to pay them the surplus, in case the said part should not prove sufficient. The Privy Council then probably intended no more than a simple aliment answerable to the interest of the children's provisions, and were made to believe that the part of the estate they were to possess would scarce amount to so much. But now it appears plainly to be of a much greater value.

It is impossible to find any manner of reason for the distinction the Lords of Session have made by their judgment, viz. That the super-intromissions should extinguish the interest of the debts due before their possession but not after; for if it was purely to answer the interest during their possession, then it could not satisfy any thing due before that time; but if it was applicable towards satisfaction of what was before due, then there is all imaginable reason that their receipts should extinguish their debts, so far as they had received.

As to the sentence or judgment upon the complaint made against the appellant on the act 1594. c. 219., there is nothing proved against the appellant to bring him under that penalty; besides, it was prior to the act of indemnity, and the respondent having taken judgment in the civil action, could not afterwards insist in the penal.

*Heads of the Respondent's Argument.*

The profits of the saw-mill were only a gift of the government to the mother for the aliment of the respondent and the other younger children, who by the appellant's forfeiture were totally deprived of maintenance: and the respondent never intromitted therewith, otherwise than as a servant to her said mother, who discharged her of all such intromissions.

By the said act 1594. c. 219., It is provided "that if any person either persewer or defender sould happen to slay or wound to the effusion of blood, or uthewise to invade ane of them ane uther in ony sorte quhairupon they micht be criminally accused, after the raising of the summondes and precepts and lauchful execution thereof, or in ony time before the compleit execution to be recovered thereupon, the committer of the slaughter, blood or invasion in maner foresaid, gif he be the defender, he fall be condemned at the instance of the persewer, without ony probation of the libel except summar cognition to be tane of the slaughter, bloodshed, or invasion before the justice, or ony other judge competent thereto."

The acts of invasion which the respondent set forth against the appellant in her complaint to the Court, were within the provisions of this act of parliament; and of this invasion the respondent made full proof not only by witnesses, but also by letters under the appellant's own hand. She also complained to the Court of Session of another act of invasion, which occurred during the examination of the witnesses.

In July 1711, the Court ordered a state of the proof of the invasion which had been taken, to be prepared for their consideration, and afterwards declared they would consider the same with their first conveniency, but the respondent choosing rather to shew the justice of her debt, than the barbarity of her brother, did first proceed to the obtaining the said decree of the 29th of December 1711.

The act of indemnity, upon which the appellant founded part of his defence relates only to offences against the government, but not to any persons private right or damages.

After hearing counsel, *It is ordered and adjudged that the appeal be dismissed; and that the interlocutors or decrees therein complained of be affirmed: and it is further ordered that the said Alexander Robertson shall forthwith pay or cause to be paid to the said Margaret Robertson the sum of 40l. sterling for her costs sustained in defending the said appeal.*

For Appellant,  
For Respondent;

J. Pratt. P. King.  
Tho. Lutwyche.

Judgment,  
4 June,  
1712.



Sir James Sinclair of Dunbeath, Bart. - *Appellant* ; Case 17.  
 John Sinclair of Ulbster, Esq. - - *Respondent*.

2d, June 1713.

*Provisions to Children.*—A portion being left to a daughter ; with a proviso, that she should not dispose of or incumber the same, or interest thereof, till the times of payment should be elapsed ; she might, nevertheless, make an assignment thereof, in trust for herself, to have an action carried on to recover the interest.

*Appeal brought for delay.*—In this case the respondent found entitled to such interest, as he might have entitled himself to by registering the horning, had he not been restrained by the appeal.

*Costs.*—40*l.* given against the appellant.

**W**ILLIAM SINCLAIR of Dunbeath, Esq. and John Sinclair his eldest son, both since deceased, did by bond of provision bearing date the first of January 1688, oblige themselves jointly and severally to pay the several sums of money, or portions therein respectively mentioned to the said William's younger children, and particularly to Ann his daughter 8000 merks scots, or 444*l.* 8*s.* 10*d.* sterling, within five years after the said William's decease, and interest for the same to commence six months after his death, and to be paid monthly, quarterly, and continually until payment of the said respective portions, And the bond contained a proviso, that it should not be lawful for the said children to require payment of their said portions, before their respective marriages and having a child by such marriage, or to dispose of, or incumber their respective portions, or the interest thereof, till the times of payment should be elapsed.

The said William Sinclair afterwards did, by a deed on the 19th of August 1690, bearing to be in consideration of certain sums of money, at least for relieving him of the burden of the children's portions to his satisfaction by William Sinclair his second son, sell and dispone to the said William the son his whole personal estate : and he died in September 1690. After the father's death, William the son possessed himself of the whole personal estate, which was of great value, and far more than sufficient to discharge the said portions ; and he settled the whole of them except his said sister Ann's. William having died, was succeeded by the appellant, also his brother and heir ; and Ann received from her brother William in his lifetime, and her brother the appellant after his decease, for and upon account of the interest of her said portions, several sums of money in the whole amounting to 72*l.* 9*s.* 1*d.*

The appellant having afterwards refused to pay his sister Ann her said portion or the interest thereof, and she being unable to carry on an action against him on account of her poverty, she assigned the bond of provision, and all money that was or should become due or payable to her, for principal or interest thereupon, in trust nevertheless for herself, to the respondent her relation,

who was willing to prosecute such suit in his own name against the appellant if necessary.

After several years forbearance, and repeated applications to the appellant, without being able to procure any part of the said Ann's provision, the respondent, who had advanced several sums of money for her support, as well to reimburse himself as for recovering what was further due upon the said bond, for the use and benefit of the said Ann, brought an action in his own name against the appellant before the Court of Session, for recovery of what was due upon the said bond of provision.

The appellant appeared to the said action, and acknowledged, that he represented his said brother; but alleged that the said portion was not to be paid until the said Ann should be married and have a child by such marriage which had not happened; and that by the proviso in the bond, she had no power to transfer or charge the interest thereof, before the term of payment were elapsed. And the said Ann's assignment being of interest to grow due, and not payable when such assignment bore date, no action could be brought by the respondent, even for the interest as the assignee of the said Ann. In answer to this the respondent acknowledged before the said Court, that the said assignment was in trust for the said Ann, and insisted that it was therefore the same thing as if the action had been in her own name. The Court on the 24th of January 1711-12, "repelled the said allegation."

And afterwards the Court on the 15th of February 1711-12, unanimously "found, that the said assignment of the said William Sinclair, the father, to the said William his son, being upon the narrative for certain sums of money really and with effect paid and delivered to him, at least for relieving him of the burden of the provisions of his children, done, paid, and performed by the said William his son to his content and satisfaction; and that the said William the son having given bonds of provision to the other children, he ought likewise to have paid the respondent and the said Ann Sinclair, the sums granted to her in the said bond of provision."

And in regard the said Ann Sinclair had restricted her action to the interest of her said portion, after the appellant had petitioned for a rehearing, the Court on the 23d of February 1711-12, adhered to their former interlocutor, as to the interest of the aforesaid portion, and without prejudice to the portion itself, and to sue for the same, after the term of payment is elapsed.

The appeal was brought from "two interlocutors of the Lords of Session, the first of the 15th, and the other of the 23d of February 1711-12."

Entered,  
1, March  
1711-12.

#### *Heads of the Respondent's Argument.*

The appellant on purpose for delay, and to hinder the respondent from proceeding further for the obtaining the effect of the said interlocutors, did on the 14th of March 1711-12, lodge his petition of appeal against the same, but did not serve the respondent with the

the order made thereupon, till the 24th of June following, so that the respondent could not put in his answer to the said appeal, in order to have the matter discussed during that Session, whereby the appellant hath not only delayed the payment of the interest of the said portion amounting to about 44*l.* but has prevented the respondent from giving him a charge of horning and registering thereof, as he might long ere now have done, and have been thereby, according to the law of Scotland, entitled to interest for the said sum, from the time of such registering.

Counsel appearing for the respondent, but no counsel for the appellant, *It is ordered and adjudged, that the said petition and appeal of Sir James Sinclair be dismissed, and that the two interlocutors therein complained of be affirmed; and it is further ordered that the Lords of Session do order Sir James Sinclair the appellant to pay to the respondent John Sinclair, all such interest as the said John Sinclair might have entitled himself unto by diligence had he not been restrained from doing diligence by reason of the said appeal to this house; and it is also further ordered that the said Sir James Sinclair shall pay or cause to be paid to the respondent the sum of 40*l.* for his costs sustained by reason of the bringing the said appeal into this House.*

Judgment,  
2 June  
1713.

For Respondent, P. King.

Adam Cockburn of Ormiston, one of the  
Senators of the College of Justice, and  
Dame Ann his Wife, - -

*Appellants;*

John Hamilton of Bangour, a Minor, by  
his Guardian, - - -

*Respondent.*

Case 18.

Forbes, 4 &  
23 July,  
1712.

12th June 1713.

*Construction.*—In a question with regard to funeral expences, and expences of confirmation, the House of Peers having reversed a judgment of *lis finita* and found that the assignee of an executrix might insist for these claims, it was still competent to plead prescription thereto.

*Funeral Charge. Prescription.*—The accounts paid by the said assignee, without the 3 years were prescribed where she herself was not contractor, but where she was contractor did not prescribe.

*Confirmation.*—The Expences of confirmation though not especially conveyed to the said assignee, but paid by her, are found to exhaust the executry.

*Debitor non præsumitur donare.*—By marriage contract a wife is provided to the household furniture, the husband afterwards grants her a bond and the liferent of a house is settled upon her, these may subsist as separate and distinct rights.

AFTER determination given in the former appeal (No. 9. of this collection), the parties returned to the Court of Session, and the appellants claimed the whole funeral expences, and charges of confirmation; and insisted that in consequence of the judgment of the House of Peers, no objection thereto could now be stirred on the part of the respondent. The latter contended, on the other hand, that objections were still competent; and insisted that

that the whole funeral expences were prescribed, having been paid by the appellant Ann, after a lapse of three years from the dates of furnishing; and to the charges of confirmation the respondent made the same objection which had formerly been propounded, namely, that they were paid by the executrix herself, and were not specified in the assignation made by her to the appellant Ann. After sundry proceedings on these points, the Court on the 23d of July 1712, "found that notwithstanding "of the decree and judgment of the House of Lords, it was "still competent to the defender to propose prescription, and "found the accounts of the funeral charges paid without the "three years are prescribed where the pursuer Ann was not contractor, but where she was contractor do not prescribe; and "found the expences of confirmation, not being transmitted by "the assignation to the pursuer Ann, do not exhaust the subject "of the executry."

In the mean time another point had arisen in this cause. By the marriage contract, in the former appeal mentioned, between Sir William Hamilton and the appellant Ann, the latter accepted of the liferent, provision thereby provided to her in full satisfaction of all legal claims, "except the whole household plenishing that "should happen to be in their dwelling-houses, the time of his "decease, which household plenishing, heirship moveables included, in case she survived him, he thereby disposed to her "free of all debts whatsoever." At a subsequent period Sir William executed in favour of the appellant Ann, the bond for 7000*l.* in the former appeal mentioned; and having afterwards purchased a house in Edinburgh, Sir William provided the liferent thereof to her after his decease.

The respondent brought an action before the Court of Session, against the appellants, for reduction of the decree, in the former appeal mentioned, which had been pronounced of consent of parties and extracted in September 1710, on the ground of minority and lesion, as his curator had omitted to ask allowance for the value of Sir William Hamilton's household furniture, intermitted with by the appellant Ann; and also of the rent of the house in Edinburgh, which she possessed in virtue of the said right of liferent, both which he contended ought to have been deducted from the 7000*l.* bond. After sundry proceedings in this action of reduction, the Court on the 4th of July 1712, "found "that the 7000*l.* bond granted by the said Sir William Hamilton "to the defender Ann, and the liferent of the house also provided to her, cannot subsist as separate and distinct rights; and "also found that the defender Ann could not claim the household plenishing without allowing the value thereof in part payment "of the 7000*l.* bond, and therefore sustained the reasons of reduction as to these two articles."

The appeal was brought from "several decrees, sentences, and "interlocutory orders of the Lords of Council and Session, of the "4th and 23d July 1712".

Entered,  
April 10,  
1713.

*On the point of Funeral Expences, and Charges of Confirmation.*

*Heads of the Argument of the Appellants.*

This point is not now open, for the House of Lords having reversed the judgment of *lis finita*, and allowed the appellants "to insist" for the funeral charges and expences of confirmation, their right to the same was thereby established, and the Court of Session had only to consider what the appellant Ann had paid on these accounts.

With regard to the charges of confirmation, as the executrix assigned her whole right of administration to the appellant Ann, there was no occasion for any particular assignation of these charges. And the appellant Ann was taken, bound to indemnify the executrix against these charges, and has actually paid the same.

*Heads of the Respondent's Argument.*

Though it be determined by the judgment of the House of Lords, that the appellant should be at liberty to "insist" for the funeral charges, and charges of confirmation, the respondent was not, nor was intended to be thereby precluded from insisting on any thing he should be advised as a bar to this demand.

Though the executrix herself might have deducted the expences of confirmation from the personal estate, yet the appellant Ann has no pretence to do so; because as she is not executrix herself, and did not pay out any part of these expences, so she has no manner of right to them from the executrix who paid them; and she neither was nor could be assigned to the office of executrix, but only to the personal estate.

*In the Reduction.—Heads of the Argument of the Appellants.*

The property in the household furniture accrued to the appellant Ann, in virtue of the contract of marriage, at the very moment of her late husband's decease, and this property could not be supposed to be taken from her by the bond for 7000*l.* which did not become payable, or bear interest, till about five months after his decease, for he died in December, and the bond did not fall due till the Whitsunday following. They must therefore be understood as different rights, since they were to take effect at different periods of time. And the declaration in the bond that it should be effectual for forcing his heirs, &c. to pay the same, or else that it should affect his whole estate real and personal, could only be intended of such estate as fell to them, of which the household furniture formed no part.

With regard to the life-rent of the house, though the court had sustained the bond to be in satisfaction of the annuity, (which the appellants acquiesced in, knowing that the estate was not sufficient to answer both demands) yet it could not be reasonably supposed that this bond should be extinguished by the subsequent grant of the life-rent of the house. Though in the point of the annuity and posterior bond, the Court held that the annuity was satisfied by the bond, upon the ground that *debitor non presumitur donare*,

*donare*, yet there is still liberty for a person to give twice, and the second gift cannot be taken away by the first, or presumed to be in satisfaction thereof, as a gift might be where the giver lies under an antecedent obligation.

*Heads of the Respondent's Argument.*

It is a maxim in the law of Scotland, that *debitor non presumitur donare*, and consequently whatever the appellant Ann enjoys and possesses of Sir William Hamilton's estate by whatever title must be imputed in payment and satisfaction of the said 7000*l.* bond *pro tanto*. When the action, therefore, was brought for the annuity of 200*l.* secured to the appellant by the marriage contract, the Court found that the bond was to be considered in satisfaction of that annuity. The respondent does not at all question the right of the appellant Ann to the household furniture by the contract of marriage; but he insists, that if she betake herself to the bond, she cannot touch any part of Sir William Hamilton's estate by whatever title, but what must be imputed in satisfaction of the bond *pro tanto*, for the bond and the provisions in the contract of marriage, cannot subsist as separate deeds. And this appears plainly to have been the intention of the grantor, since by an express clause in the bond, he declares, that it should *affect his whole estate, real and personal*. Nor does the grant by the contract of marriage transmit the property in the furniture immediately, but it must have been confirmed, given up in the inventory, and was subjected to the payment of the husband's debts, which never was disputed.

Nor is it of moment to urge that the life-rent of the house being granted after the bond, the same could not be in satisfaction of that life-rent. For by the law of Scotland a bond by a husband to his wife is looked upon only as a legacy or testamentary deed, and is interpreted to be only dated from the death of the grantor, and consequently this bond must be looked upon as *posterior* in date to the deed giving the appellant Ann the life-rent of the house.

Judgment,  
12 June  
1713.

After hearing counsel, *It is ordered and adjudged, as to such part of the said decree or interlocutory sentence of the 23d of July, complained of in the said appeal, whereby the said Lords of Council and Session found, "that notwithstanding the decree and judgment of this house, it was "still competent to the respondent to propose prescription," and found, "that the accounts of the funeral charges paid without the three years "were prescribed, where the appellant Ann was not contractor, but "where she was contractor, were not prescribed," that the same be so far affirmed: but as to such part of the said decree or interlocutory sentence of the said 23d of July, complained of in the said appeal, whereby the said Lords of Session found the expences of confirmation (or administration), not being transmitted by the assignment to the appellant Ann, did not exhaust the executry or personal estate, it is further ordered and adjudged, that the same be so far reversed; and it is further ordered and adjudged that the ordinary and extraordinary costs and expences touching the administration or confirmation of the testament of the deceased,*  
shall

shall be taken as remaining due upon the bond bearing date the 5th day of March 1703, and be computed with interest from such time as the money secured by the said bond became payable until the payment thereof, and stand as a charge upon the heritable estate: And it is further ordered and adjudged, that the said decree, order, or interlocutory sentence of the 4th July last, whereby the Lords of Council and Session did find, "that the said bond of 7000l. granted to the appellant Ann by her late husband, and the estate for life, in the house granted also to her by her said late husband, could not subsist as distinct separate rights, and that she could not claim the household goods, by virtue of her contract of marriage, without deducting the value thereof from the said bond, and therefore sustained the reason of the reduction of the decree mentioned in the said appeal," as to those two articles be reversed.

For Appellants, T. Powys. / P. King.  
For Respondent, Rob. Raymond. J. Pratt.

The judgment of the Court of Session on the point of the maxim *debitor non presumitur donare*, though here reversed, is stated as an existing case in the Dictionary of Decisions, vol. II. voce *presumption*, p. 145. and in Erskine, B. 3. Tit. 3. §93.

William Lord Viscount Kilsyth, Sir Hugh Paterson of Bannockburn, John Murray of Touchadam, Archibald Seton of Touch, and John Erskine of Balgounie, Heritors of the Parish of St. Ninians in the Shire of Stirling, for themselves and in name and behalf of the other Heritors of the said Parish, - - - - Appellants;  
The Moderator and Presbytery of Stirling, Respondents.

Case 19.

13th June 1713.

*Tand Court.*—Reasons sufficient to reduce a decret of erection of a new parish.  
—The reasons of reduction ought to have been advised before ordering a new proof and perambulation.

**I**N 1696, an application was made to the Presbytery of Stirling by certain heritors of the parish of St. Ninians, setting forth that the said parish being near ten miles in length from west to east, and six in breadth from north to south, and very populous, it was impossible for one person to serve the cure; and several of the parishioners being at considerable distance from, and having bad roads to the church, could very seldom attend divine service; and there being free teinds therein sufficient for the maintenance of two ministers, the application therefore stated, that it was necessary that the said parish should be divided, and a new church erected

erected in the east part thereof. The Presbytery, having made a perambulation in consequence of this application, agreed that there should be a new parish church erected and built at Sauchinford, and that certain lands by them mentioned should be disjoined from the parish of St. Ninians, and annexed to the new parish of Sauchinford.

Accordingly, in 1697, the moderator of the said presbytery brought an action before the then commissioners for plantation of churches and valuation of teinds, against the heritors or proprietors of the said parish of St. Ninians, for disjunction of certain lands from that parish, and erecting them into a new parish; and to have a new church erected at Sauchinford, and a stipend settled and allocated to such minister as should be ordained to the new parish. Appearance was made by the appellants and other heritors of the parish in this action, as defenders therein, and the lords commissioners appointed two of their own number, or any one of them, to perambulate the bounds, and to report what was proper to be done.

The commissioners so appointed, accordingly met at Sauchinford, and after some steps taken by them, gave it as their opinion, that a new erection was proper and necessary in the east end of the said parish of St. Ninians, and that Sauchinford was the most convenient place for building the new church; and in these terms they made their report to the said commissioners for plantation of churches, &c. These commissioners, by their interlocutor, on the 26th of January 1697-8, "Separated and disjoined " the lands" therein particularly mentioned " from the church " and parish of St. Ninians, and united and erected them into a " new parish by themselves, and decreed and ordained a new " church to be built for the ease of all the inhabitants of the said " lands at Sauchinford, to be thereafter called the parish church " of Sauchinford, and ordained letters of horning to be directed " to the heritors and parishioners to meet and rent themselves for " buying ground for the church and church-yard, and for building the said church and church-yard walls and manse." The defenders in the said action presented a petition reclaiming against said interlocutor, insisting that a new erection was unnecessary, and even if it were necessary, that Sauchinford was not a proper place for the new erection: but the lords commissioners, on the 2d of February thereafter, adhered to their former interlocutor. And in these terms decree was extracted.

Nothing, however, was done in consequence of this decree till June 1709, when the respondents brought an action before the lords of council and session as commissioners for plantation of churches and valuation of teinds, against the heritors of the parish to modify, allocate, and appoint a stipend for a minister to the said new kirk and parish, called the parish of Sauchinford.

And the appellants, on the other hand, brought their action to reduce and set aside the said decree, on the grounds, that the methods prescribed by the lords commissioners themselves in perambulating and surveying the said parish, and adjusting a place for building the said church, were by no means observed; that



the church was to have been built in the most inconvenient part of the parish; and likewise, that several of the heritors were not called in the said action, particularly the Duke of Montrose, then a minor, his tutors or guardians, nor the trustees of Cowan's Hospital, who were considerable proprietors in the parish.

The lords commissioners pronounced an interlocutor on the 11th of February 1712-13 in the following terms: "Before answer to the reasons of reduction, ordain the hail parishes of St. Ninians and Sauchinford to be perambulated, and for that effect grant commission to the sheriff of Linlithgow or his deputy to take and receive the oaths and depositions of such famous witnesses as shall be adduced for clearing the distances of places, or any other points which may happen to be controverted with relation to the new erected parish, or the convenience or inconvenience of the new erected kirk; and in the mean time appoint the whole heritors of both parishes to depone upon their rentals before the said commissioners."

The appellants reclaimed, praying the lords commissioners to determine with regard to the reasons of reduction in the first place, before putting the heritors to the trouble or expence, which would be the consequence of the former interlocutor: but on the 18th of February 1712-13, the lords commissioners "adhered to their former interlocutor."

The appeal was brought from "a decree made by the lords commissioners for plantation of kirks and valuation of teinds in the year 1697-8; and of two interlocutors of the 11th and 18th of February 1712-13, made by the lords of council and session."

Entered  
21 April,  
1713.

*Heads of the Appellants' Argument.*

If a new erection were necessary, it ought to have been done with the consent of the heritors of the parish; but though the appellants and all the heritors, except Sir John Schaw of Greenoch, and Mr. Greenyards his factor, (who made the original application to the presbytery,) pleaded against this new erection, yet the lords commissioners paid no regard to such opposition, but over-ruled the plea of the appellants. This arbitrary mode of proceeding in similar cases occasioned the parliament of Scotland, when they vested the powers, formerly lodged with the commissioners for plantation of churches, in the lords of session, to make an express injunction, that they should not disjoin any parishes, erect or build new churches, or annex or dismember churches, but with consent of the heritors having three parts in four at least of the valuation of the parish to be disjoined. And though this act of parliament be posterior to the decree of 1697-8, yet the reason and just foundation of the law ought to have some weight to avoid this decree.

The methods prescribed by the lords commissioners themselves for perambulating the parish were not observed by those entrusted by them. For they only went into one corner of the parish, and refused to perambulate the whole parish, when desired by some of

the heritors; and, without taking the depositions of witnesses, either touching the necessity of a new erection, or the place where the new church should be erected, they put some questions to the persons accidentally present, and went to a certain place where they could not see the tenth part of the parish, and had only in view that very part and those very lands contained in the presbytery's report. Upon this very slight view, they reported that a new erection was necessary, and that Sauchinford was the most convenient place for building the church. This favoured so much of partiality, first to appoint a perambulation upon the desire of only two heritors, and then to perambulate only that part which those two desired, being near to their own houses, that the decree ought certainly to have been reduced for that reason. And if any new erection were necessary, Sauchinford is the most improper place in the whole parish; for it is within two miles of the old parish church, and none of the lands annexed to the new erected parish are above three miles distant from such old church, and have a very good road to it, and several neighbouring churches; whereas several parts of the south-west end of the parish are seven or eight miles distant from the old church, and have very bad roads to it, and the new intended church will be two miles farther distant from these places.

It is an unquestionable rule and maxim of the law of Scotland, that any action of this kind, if not brought against all the heritors or proprietors, is in itself void, even against those against whom it is brought. In the present case, neither the Duke of Montrose's tutors, nor the trustees of Cowan's Hospital, who are considerable proprietors, were called, and consequently the decree must be reduced. This is so certain a rule that it has never been disputed or controverted, and the Lords of Session were so sensible of this, that they declined to give judgment upon it, but in a manner delayed it by their interlocutor of the 11th of February last.

If the decree of 1697-8 were so illegal and informal, it is apprehended the Lords of Session were in the wrong to decline giving judgment upon them, and to ordain a new perambulation; for all that trouble and expence was to no purpose, till it were determined whether the decree was good or not, and consequently a new erection necessary.

#### *Heads of the Respondent's Argument.*

The original application in this matter to the presbytery in 1696, was by many of the heritors of the parish, with concurrence of the minister. The decree which was obtained being in the hands of Sir John Schaw (the chief heritor who obtained it), and he happening to die leaving his son a minor, the respondents could not for several years procure the same to be exhibited.

When a commission of perambulation is granted, especially by judges to any of their own number, concerning the situation or bounding of any place, the same is best executed by ocular inspection, which the commissioners here made from eminences to  
which

which they were conducted by the appellants themselves, and from whence they viewed the circumjacent places within the said parish, as appears by their report. As to their not perambulating the whole parish, there was no reason for such perambulation, since the libel, whereon the commission was founded, related only to the east end of the parish of St. Ninians, for a division whereof the suit was expressly brought.

With regard to the objection, that all the heritors were not summoned in the original action, it sufficiently appeared by the decret therein, that as well the Duke of Montrose and his mother and her husband, as the then masters (the sole managers) of Cowan's Hospital were all duly summoned.

It was to obviate every colour of objection for want of a sufficient perambulation, that the Lords of Session, before determining the reasons of reduction, granted commission for a new perambulation, and to take the depositions of the heritors upon their rentals, extant in process. And when the appellants petitioned against such new perambulation, &c. and prayed that the reasons of reduction might be first determined, as their petition was only designed for delay, their lordships refused the same.

After hearing counsel, *it is ordered and adjudged, that the decree and interlocutors in the said appeal complained of, be reversed.* Judgment, 13 June 1713.

For Appellants, Rob. Raymond. Tho. Lutwyche.  
For Respondent, P. King. John Pratt.

George Innes, Provost, Kenneth Mackenzie,  
Alexander Falconer, and James Charles,  
Baillies of the Burgh of Elgin, and James  
Russell, Beadle or Sexton,

The Ministers of the Church of Elgin, her  
Majesty's Advocate, and John Dundas,  
Procurator for the Church of Scotland,

*Appellants;*

*Respondents.*

Case 20.  
Kaim's  
Law Tracts,  
p. 276.  
Macdonald's  
Crim. Cases,  
p. 582.

3d July 1713.

*An Appeal from Interlocutors of the Court of Session, and Decrees of the Court of  
Justiciary founded thereon.*

*Intrusion into Churches.*—The Magistrates of Elgin, being pannelled and convicted under the acts 1695, c. 22., and 1711, c. 7. of an intrusion into the Parish Church, and a fine imposed upon them, the judgment is reversed.

**P**ART of the ancient cathedral church of Elgin was fitted up for divine service in the modern form, and used as the parish church of Elgin. Adjoining to this parish church, but separated from it by a wall with a mutual door of communication was a chapel called the *Little or East Kirk*, which was also fitted up with pews and desks for publick worship; and of this *Little Kirk*, the appellants, who are of the episcopal communion, contended that they

they had the disposal for religious uses exclusive of the ministers of Elgin.

In 1704 Mr. Henderson, an episcopal minister, with consent and permission of the then magistrates of Elgin, made use of the Little Kirk for divine worship; but the ministers of the burgh made their complaint to the Privy Council, and their Lordships made an order commanding and ordaining the sheriff of the county of Elgin to put and keep the said ministers in peaceable possession of the said *Little Kirk*, and to hinder and debar all other persons from making use of the said *Little Kirk* in time coming as they should be answerable at their highest peril. Mr. Henderson was accordingly by virtue of this order removed, and the ministers put and kept in possession.

In 1712, however, the appellants took a further step in exercise of the contested right. Having granted leave to Mr. Blair, an episcopal clergyman, to perform divine service in the Little Kirk, for the benefit of the inhabitants of Elgin who were of that communion, the appellant Russell, to whom the keys had been entrusted by the ministers of Elgin, delivered them on the 29th of May that year to the magistrates, or opened the doors for them, who with Mr. Blair accordingly took possession of the Little Kirk.

The respondent the procurator for the church, with the concurrence of her Majesty's advocate, brought a criminal action against the appellants, and also against Mr. Blair, before the Lords of Justiciary, for an intrusion into the said *Little Kirk*, as being contrary to the act of parliament 1695, c. 22. and the Toleration Act 1711, c. 7. and demanded the restitution thereof to the ministers of Elgin, and that the appellants might be assessed in damages: but as to Mr. Blair the prosecution was soon after dropt.

1695, c. 22.  
1711, c. 7.

The appellants made defences, the magistrates insisting upon their right to dispose of the said chapel; and the Lords of Justiciary in consideration of what was alleged on either side, before they would give their final judgment, remitted this point to be determined by the Court of Session, viz. "Whether or not the place called the Little Kirk then possessed by the episcopal minister, be a parish church or part of the parish church of Elgin."

Parties accordingly were heard before the Court of Session, and on the 24th of July 1712, the Court "allowed a conjunct probation to both parties for proving if or not the said *Little Kirk* be habite or reputed to have been antiently the choir of the said church called St. Giles's, or part of the said Great Church; or how far the said Little Kirk either in the time of presbytery or episcopacy, has been possessed by the ministers of Elgin, by preaching, baptizing, catechising, or marrying therein; and how far possessed by the magistrates and town council for other uses, exclusive of the said ministers."

Witnesses were examined, and the Court of Session on the 16th of December 1712 "Found it proved, that the place now called  
" the

“ the Little Kirk has been habite and reputed to have antiently  
 “ been the choir of the church of Elgin called St. Giles’s church,  
 “ which is the parish church, and that the said *Little Kirk* is a  
 “ part of the said St. Giles’s church; and that both in the times  
 “ of episcopacy and presbytery, the said *Little Kirk* has been  
 “ made use of for divine service, for preaching, baptising, and  
 “ catechising therein: and find it not proved, that the magistrates  
 “ of Elgin have employed the said Little Kirk for any other uses  
 “ exclusive of the bishop and ministers their using and possessing  
 “ thereof: and therefore find, the said place called the Little  
 “ Kirk of Elgin is part of the said St. Giles’s church, the parish  
 “ church of Elgin.”

The proceedings of the Court of Session being reported to the  
 Lords of Justiciary, the appellants presented a petition to their  
 Lordships, stating that the interlocutor of the Court of Session of  
 the 16th December was void, not being signed the day it was pro-  
 nounced, and several alterations being made upon it the day after:  
 but the Lords of Justiciary pronounced an interlocutor on the 9th  
 of February 1712-13, which, after reciting the said interlocutor  
 of the Court of Session, “ Found that the present established  
 “ ministers their entrusting James Russell with the keys of the  
 “ Little Kirk, and his refusing to deliver the same to the said  
 “ ministers, but delivering the same to Mr. Blair, or opening the  
 “ said *Little Kirk* for his use, relevant to infer an arbitrary pu-  
 “ nishment, damages, and expences against the said James Russell;  
 “ and also found that the magistrates their turning the said esta-  
 “ blished ministers out of the possession of the said kirk, and put-  
 “ ting the said Mr. Blair in possession of the same relevant to  
 “ oblige the magistrates to reponne the said established ministers  
 “ to the peaceable possession of the said Little Kirk, and to infer  
 “ an arbitrary punishment, damages, and expences against the  
 “ said magistrates; repelled the defence proponed for the magi-  
 “ strates and James Russell; and remitted them and the libel as  
 “ found relevant to the knowledge of an assize.”

After a proof taken before the jury, they by their verdict  
 found that James Russell had the trust of the keys of the said  
 Little Kirk, and that the magistrates with Mr. Blair took pos-  
 session of the said Little Kirk upon the 29th of May 1712.”  
 After this verdict was returned, the Court of Justiciary on the 2d  
 of March 1712-13 “ decerned and ordained the said magistrates  
 “ and their successors in office, and the said James Russell jointly  
 “ and severally to deliver all the keys of the said Little Kirk to  
 “ the established ministers and Kirk Session of the said burgh and  
 “ parish, and to put the established ministers and Kirk Session in  
 “ peaceable possession of the said *Little Kirk*, and to pay 30*l.*  
 “ sterling as expences, and a fine of 20*l.* sterling; and ordained  
 “ Kenneth Mackenzie” (the cautioner for the other appellants)  
 “ to make present payment of the said sums, or be imprisoned till  
 “ payment thereof.”

The appeal was brought from “ several interlocutory orders, Entered,  
 “ or sentences of the Lords of Session of the 24th of July and 16th 1713.

" of December 1712, and the orders, sentences, or decrees of the  
 " Lords of Justiciary of the 9th of February and 2d of March  
 " 1712-13 founded thereon."

*Argument of the Appellants (a).*

The parish church of Elgin, being large enough for the presbyterian congregation, the leave granted by the appellants to Mr. Blair to perform divine service in the Little Kirk, could be no disturbance to them.

The magistrates having merely insisted on their right of disposing of the said Little Kirk for holy uses (b), the words in the interlocutor of the Court of Session, of the 24th July 1712, allowing it to be proved " how far possessed by the magistrates and " town-council for other uses," were inserted without reason.

When the witnesses were examined on both sides, the appellants did fully prove, that the Little Kirk, when ruinous, was repaired at the sole charge of the magistrates and community, as a church belonging to themselves, distinct from the parish church; that the seats therein were erected by the burgeses, and that no country parishioners had seats therein, but such only as were burgeses or tenants of the said town; that the Bishop of Moray and his Vicar always administered the sacraments, and preached in St. Giles's church, and never in the Little Kirk but only in 1684, by the magistrates' allowance, when St. Giles's church was ruinous; on which occasion the Bishop made application to the magistrates and town-council for the use of the Little Kirk, and as soon as the parish church was repaired, he returned the keys of the Little Kirk to the magistrates, thanking them for the use thereof, and using these words " we found it close, and we return it " close:" that the Little Kirk hath not within memory of man been reputed the parish church or any part thereof, and is of a different sort of building, and that the magistrates had frequently disposed of the same for religious uses: that there is no communication between the Great Church and the Little Kirk, save only by a very small door, which has been made in the wall, which divides the same, of late years, for the convenience of ringing the bell: that upon the revolution, when the government was in some disorder, the parish ministers usurped the possession of this chapel, but as soon as the publick affairs were settled, the magistrates demanded the keys thereof from them, as a place to which the ministers had no right, and they being sensible thereof delivered up the same accordingly, and they were afterwards kept by such persons as were appointed by the magistrates.

But afterwards on the removal of an episcopal minister, as not legally qualified, the presbyterian ministers in some measure possessed the said chapel by permission of the magistrates, and made use thereof for baptizing, catechizing, and weekly lectures, which the respondents having proved, and having also made some slender

(a) In this case, on account of its singularity, it was deemed proper not to abridge the argument. The judgment is also stated at length.

(b) This fact is denied by the respondents.

proof that the said Little Kirk had been reputed by some to have been the choir belonging to the great church, the Court of Session on that evidence, and by taking advantage of the words "to other uses" inserted in their interlocutor before mentioned, proceeded to pronounce their other interlocutor of the 16th of December 1712, though the appellants had made sufficient proof of the magistrates disposing of the said Little Kirk to the same religious uses, exclusive of the parish ministers.

Though this last mentioned interlocutor was pronounced on the 16th day of December, yet it was not written fair or signed by the Lord President on the day it was pronounced as it ought to have been; but the Court of Session did the next day make several alterations thereon, without calling parties before them, contrary to the act 1693. c. 18. whereby the said interlocutor became null and void. And when this interlocutor was transmitted to the lords of justiciary, the appellants gave in a petition to their lordships representing that it was for these reasons become null and void; and that they presumed the truth of the fact consisted with their lordships own knowledge, as being judges in both Courts, and offering to make proof thereof if they should be admitted to do so. The lords of justiciary however, without taking any notice of this matter, or allowing the appellants to produce witnesses (as they could have done) to prove the same, or giving any answer thereto, pronounced their interlocutor of the 9th of February last on the relevancy, wherein the said void interlocutor of the Lords of Session of the 16th of December last is recited as the ground thereof.

*Argument of the Respondents.*

The cathedral or parish church of Elgin, was at first built in the form of a cross, the west part of which formed the body of the church, the east the choir, and upon the south and north are two little aisles, and over all a large steeple raised upon four arches in the center.

The witnesses examined in this cause fully proved, that the Little Kirk was anciently the choir of the great church; that these two are joined together by a steeple which stands upon four arches, whereof one looks into the great church, and the other into the Little Kirk; that the last is built up, but the difference of the building wherewith it is filled up, is easily distinguishable, and there is still a door left in the said wall, by which people sitting near to it may in the Little Kirk hear a sermon preached in the Great Church: That several of the proprietors of the parish have seats in the Little Kirk, and it was lately repaired by the Kirk Session: That for several years it was the only parish church, the other being out of repair, and that the present parish ministers have been in use to preach, baptise, catechise, marry, and keep sessions in the said Little Kirk, and always preached their weekly sermons on Tuesdays there: and that, as well before as after the revolution, the parish ministers of Elgin made use of the said Little Kirk for divine service. All these facts are not only proved  
by

by the witnesses for the respondents, but also by several of those adduced for the appellants.

The appellants in their defences before the Lords of Justiciary pretended to a property in the Little Kirk, and a right of disposing of it as they pleased; not to holy uses only, but as a place belonging to the burgh, and employed by the magistrates as a school-house, as a publick office for collecting taxes, an ordinary Court for justices of peace, and a magazine for the said town.

The interlocutor of the 16th of December was duly signed, according to the custom of the Court of Session, notwithstanding what the petition of appeal untruly suggests.

Though the several interlocutors of the Court of Session, and Lords of Justiciary be warranted by all the rules of equity and justice, the appellants have appealed from them, under pretence that the said Little Kirk was no part of the parish church, but belonged to the magistrates of the burgh, and was at their disposal. But not only the situation of the Little Kirk pleads the contrary, but the jury have also found the contrary; and it appears plainly from the proof, that both before and since the revolution, the ministers of Elgin have been in a constant use of performing divine service as well in the Little Kirk as the other. And when Mr. Henderson in 1704 did intrude into this Little Kirk, the Lords of the Privy Council ascertained the ministers right to the same, and ordered them to be put and continued in the quiet possession thereof; and since the act passed last Session of Parliament expressly excepts parish churches from being used by any of the episcopal persuasion, they should have satisfied themselves with the indulgence so granted to them, and not have endeavoured to disturb the peace, and quiet of the church of Scotland, by dispossessing the said ministers of the Little Kirk, which they were possessed of.

1711. c. 7.

Judgment,  
3 July,  
1713.

*After hearing counsel upon the petition and appeal of George Innes Provost, and Kenneth Mackenzie, Alexander Falconer, and James Charles Baillies of the burgh of Elgin, in North Britain, and James Russell, beadle or sexton, from several interlocutory orders, or sentences of the Lords of Session of the 24th of July and 16th of December last, and the orders, sentences, or decrees of the Lords of Justiciary of the 9th of February and 2d of March last, founded thereon, made on the behalf of the plaintiffs and prosecutors in this cause, praying the reversal of the said orders, sentences or decrees; as also upon the answer of John Dundas, Esq. procurator for the church of Scotland, and Sir James Stewart, Bart. one of her Majesty's Solicitors for Scotland, for her Majesty's interest, and due consideration of what was offered thereupon:*

*It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the several interlocutory orders, or sentences of the 24th of July and 16th of December last, and other subsequent orders complained of in the said appeal, shall be and they are hereby reversed; and it is further ordered and adjudged that the said appellants be quieted in the possession of the Little Church in Elgin, it being no part of the Parish Church; and that the said respondents do repay to the said appellants*



*appellants the costs and fine adjudged by the said Lords of Justiciary to the said respondents.*

For Appellants,	<i>Rob. Raymond,</i>	<i>Tho. Lutwyche.</i>
For Respondents,	<i>John Pratt,</i>	<i>P. King.</i>

This being the only instance of an appeal from the Court of Justiciary that has been decided upon in the House of Peers, it has at different periods met with much consideration. A short statement of the facts is given by Lord Kaimes in his law tracts, p. 276; and by Mr. Maclaurin in his collection of criminal cases, p. 582; but this last learned author mentions that he had not been able to get inspection of the appeal cases, though a search had been made for them.

It does not appear that any objection was stated to the *competency* of this appeal, at least no traces of such objection are to be found in the cases, or in the journals of the House of Lords. It is worthy of notice, on this point of the competency, that in the appeal of Greenshields v. Lord Provost and Magistrates of Edinburgh, (No. 5. of this collection,) the subject of which was very similar to that of the present appeal, an objection as to competency, though of a different nature from what might have been suggested on the present case, was then argued and over-ruled.

The objection of the appellants relative to the alleged nullity of the interlocutor of the Court of Session, is not mentioned by Lord Kaimes or Mr. Maclaurin, and what weight it might have in the *ratio decidendi* no where appears.

It may be proper here to mention that in the Journals of the House of Lords, 26th November 1724. there appears an appeal from the Court of Justiciary; Munro and others v. Bayne, his Majesty's advocate, and others. This appeal seems to have been received without objection, but no further proceedings are to be found on the Journal relative thereto.

Cafe 21. James Don Esq; - - - - - *Appellant*;  
 Forbes, Sir Alexander Don of Newton, - - - - - *Respondent*.  
 28 Nov.

1712.

5 Feb. 1713.

14th July 1713.

*Construction*.—An estate is entailed by a person to himself in life, and to his eldest son and the heirs male of his body, whom failing to the entail himself, whom failing to his second and third sons, and the heirs male of their bodies, &c. whom all failing to the father's nearest heirs, and assignees: another estate is entailed to the second son of the former entail and the heirs male and female of his body, whom failing to the said former entail and his heirs male of tailzie, and provision in the former entail: after failure of the institute in the second entail and the heirs male and female of his body, the heir male of the first entail succeeds to the estate contained in the second entail.

*Tailzie*.—An heir of entail prohibited from alienating gratuitously, where the prohibitory, irritant, and resolute clauses, were referred to as contained in another entail.

At making an entail the institute reconveys to his father an estate formerly settled upon him, and he and his wife discharge an obligation upon the father by their contract of marriage; the institute, nevertheless, cannot gratuitously alter,

SIR Alexander Don of Newton, the grandfather of the appellant and respondent, had issue three sons, James, Alexander, and Patrick. In consideration of a marriage between Alexander, his second son, and Anna, the daughter of George Pringle Esq. who brought her husband a considerable portion, Sir Alexander did, by their contract of marriage in 1677, settle and dispose his lands of Broomlands and Ravelaw to the said Alexander his second son, his heirs and assignees, in fee or property, without any restriction; and Sir Alexander did thereby also oblige himself to lay out 25,000*l.* Scots in the purchase of other lands to be settled in the same manner, and to pay the annual interest thereof until such purchase could be made to the said Alexander the son: and the lands of Broomlands and a house in Kelfo were thereby settled in jointure on the said Anna, in case she should survive her said husband.

Afterwards, upon the marriage of the said James, the eldest son, Sir Alexander, on the 3d of August 1681, executed a deed of entail of his lands of Newton and others, settling the same to himself in life, and to James, his eldest son, and the heirs male of his body, in fee; whom failing, to Sir Alexander the entail himself; whom failing, to Alexander his second son, and the heirs male of his body; whom failing, to Patrick his third son, and the heirs male of his body, with several other substitutions of heirs; whom all failing, to Sir Alexander (the entail), his nearest heirs and assignees. The deed contained strict prohibitory, irritant, and resolute clauses upon the said James and all the other heirs of entail.

Sir Alexander Don, having afterwards agreed with Sir Francis Scott for the purchase of the lands and barony of Ruthersford, a transaction of the following nature took place. Alexander the second son, and his wife, reconveyed to the father and his heirs  
 the

the foresaid lands of Broomlands and Ravelaw, and discharged the said obligation in their marriage-contract; and Sir Francis Scott, in 1682, disposed and conveyed the said lands and barony of Rutherford to Sir Alexander Don himself in life-rent, and to Alexander the second son and the heirs male and female of his body, "*whom failing to the said Sir Alexander Don and his heirs male of tailzie and provision contained in his investiture of the barony of Newton with and under the conditions, provisions, and limitations therein contained.*" In this deed, executed by Sir Francis Scott, the purchase-money, being 5500*l.* sterling, is mentioned to be paid by "Sir Alexander Don for himself and in name and behalf of Alexander Don his son."

After the death of Sir Alexander, in 1686, his eldest son Sir James, and his second son Alexander (afterwards Sir Alexander) entered upon and possessed the several and respective estates so provided to them by their said father.

Sir Alexander Don of Rutherford, in 1710, executed a new deed of entail of that estate, settling the same to himself and the heirs male and female of his body, whom failing to the appellant, the third (a) son of Patrick Don, old Sir Alexander's third son, and the heirs of his body: and afterwards died on the 15th of August 1712.

Sir James Don of Newton, being now also dead, and succeeded by the respondent, his son and heir, a competition arose between the respondent and the appellant for the estate of Rutherford. The respondent brought an action of declarator against the appellant before the Court of Session, claiming the estate of Rutherford under the deed of entail made thereof by Sir Francis Scott, whereby the same failing heirs of the body of Sir Alexander the son was settled upon Sir Alexander the grandfather and his heirs male of tailzie, and provision contained in his investitures of Newton; and contending that the deed executed by Sir Alexander the son, under which the appellant claimed, was void, and that Sir Alexander was expressly tied up from making any alienation of his estate by the deed under which he possessed the same. The appellant appeared and made defences, and the Court, on the 20th of January 1712-13, "Found that the respondent was next heir of entail of Rutherford by the failure of the heirs of Sir Alexander Don of Rutherford his body; and that the clause in the entail of Rutherford mentioning the prohibitory and irritant clauses in the entail of Newton, hath respect to Sir Alexander Don of Rutherford, and the heirs of his body, as well as old Sir Alexander Don of Newton, and the heirs after him, and that the said entail of Newton, referred to in the entail of Rutherford, is the last investiture in 1681; and that the disposition of Rutherford, bearing the price to be paid by Sir Alexander Don the elder, and the right taken to him in life-rent, and to his son in fee, the fee was so qualified in the person of the son, that he could not gratuitously alter the or-

(a) The respondent's case says the second son.

"der of succession; and therefore decerned in favour of the respondent."

The appellant having reclaimed, after a rehearing of the cause on the 5th of February 1712-13, the Court "adhered to their former interlocutor, and found that the clauses irritant in the entail of Newton, not being verbatim expressed, but related to in the entail of Rutherford, does affect the entail of Rutherford so as Sir Alexander Don of Rutherford could not gratuitously alter the succession, and that the entail of Rutherford relating to the conditions, limitations, and provisions in the entail of Newton does also comprehend the irritancies in the entail of Newton."

Entered,  
28 May,  
1713.

The appeal was brought from "certain interlocutory sentences, or decrees, of the Lords of Council and Session of the 20th of January and 5th of February 1712-13."

#### *Heads of the Appellant's Argument.*

By the reconveyance and discharge made by Sir Alexander the son and his wife of the said estates of Broomlands and Ravelaw, &c. settled, or agreed to be settled, by their marriage-contract, Sir Alexander the son was and ought to have been adjudged the real purchaser of the said barony of Rutherford; and therefore, according to the laws of Scotland, he had power to settle and dispose the same as he thought fit, as he might the said estates of Broomlands and Ravelaw, if they had not been reconveyed.

Though Sir Alexander the son had not been such real purchaser, yet the clause in the entail of Rutherford, referring to the entail of Newton, could not properly be understood otherwise, than for limiting the estate of Rutherford, in case of Sir Alexander the son's death without issue to Patrick the appellant's father, who in the entail of Newton, is mentioned next substitute, or in remainder after the said Sir Alexander the son and his heirs male.

And, however this might be, though Sir Alexander the son might by the irritant or prohibitory clauses in the said deed referred to, be restrained from selling, contracting debts, or doing any acts whereby the estate might be evicted from the family by a stranger, yet he could not by any thing therein contained be debarred from altering or interrupting the course of succession thereto in his own family.

#### *Heads of the Respondent's Argument.*

Whatever transactions were betwixt the father and son, it is certain that old Sir Alexander Don, was the purchaser of the estate of Rutherford; he paid the price, he took the estate to himself for life, to him the deeds relating to that estate were to be delivered, and to him the warrandice was granted. And since the said estate was sold conditionally, and Sir Alexander the son accepted of, and possessed by that deed, the appellant who claims under him, can be in no better circumstances. Sir Alexander the grandfather, then, being the purchaser, might dispose of and settle his estate in what way and manner he pleased; and he having expressly

expressly granted it under the conditions, limitations, and restrictions, contained in the investment of Newton, whereof this was one, that neither he who was institute, nor any of the substitutes, should be capable to do any deed to the prejudice of any of the substitutes, Sir Alexander the son, was no doubt tied up from doing any deed to alter the order of succession, and consequently the deed under which the appellant claims is void.

Though, as the appellant contended, the respondent could not be served heir to old Sir Alexander, who became merely a life-renter, yet he is in the true genuine signification of the word his heir, that is universal successor to him: to the respondent alone ought the lands of Rutherford by the said deed to descend: he alone is Sir Alexander the grandfather's heir male, being his grandson by his eldest son: he alone is heir of entail, and provision of the estate of Newton, the same being limited to him in the first place, and as such he has succeeded to, and now is in possession of these lands. And the description in the deed of settlement of the Lands of Rutherford, whereby the same are limited upon the failure of the issue of Sir Alexander the son, to Sir Alexander the grandfather's heirs male and of entail and provision in the lands of Newton can possibly agree to nobody else but the respondent.

If the word heir was taken in so restricted a sense as the appellant contends it could be of no import to him, since Sir Alexander the father having died, when he was but life-renter, the appellant no more than the respondent could be heir to him. For the only case in which Sir Alexander the grandfather could have an heir served to him, was upon the event of the reversion of the estate of Newton to him, upon failure of issue male by his eldest son, but even in that case the respondent has a good claim, being Sir Alexander the grandfather's right heir, and as such the last in substitution mentioned in the said deeds of settlement.

The respondent's claim is not only founded upon the express words of the deed, but upon the presumed will of the donor, who having acquired a considerable estate, did mutually entail the estates that he granted to his eldest and second sons, expressly tying them both up from doing any thing in prejudice thereof, designing (as he expresses it in the recital of those deeds) *the continuation of his memory and family*: and were there any doubt, as there is not, the presumed will of the donor is of great weight, and the rule in such cases.

The appellant objected that the irritant clauses, &c. were not expressed, but only referred to in the entail of Rutherford, and so not binding, but this is contrary to all the known rules and principles of the law of Scotland, by which settlements are very often made to have relation not only to deeds already executed, but to such as may be executed; and in this case, Sir Alexander the grandfather having made that settlement of the lands of Newton, and a very few months after this of Rutherford, he could not have better expressed his intention, that the several heirs of entail should be tied up from alienating the estate, than by making it under all the conditions, limitations and restrictions, mentioned

in the first deed, which had been duly published and inserted in the publick records of the kingdom.

Judgment,  
14 July,  
1713.

After hearing counsel, the question was put "whether the said interlocutory sentences, or decrees shall be reversed," it was resolved in the negative : (a)

Ordered and adjudged that the petition and appeal be dismissed, and that the interlocutory sentences or decrees, therein complained of, be affirmed.

(a) Notwithstanding the form of this judgment, it is not therefrom to be understood (as I believe,) that the judgment had been opposed : this is the common form of putting the question on every judgment on appeal.

Cafe 22. George Lockhart Esq; - - - Appellant;  
John Cheisly of Kersewell, Writer in Edinburgh, Margaret Pow, William Montgomery, Walter Cheisly, and William Bertram, - - - Respondents.

7th May 1714.

*Non-entry.*—A Superior having obtained a general declarator of non-entry, his agent in a subsequent ranking restricts the superior's interest so as to be ranked posterior to annual renters. On a reduction by the superior on the head of lesion and as being *absens reipublicæ causa*, the ranking is sustained.

*Ranking and Sale.*—It is not relevant to reduce a decret of ranking, that posterior to the date of the decret the interests of certain creditors were produced, and ranked, and yet no new decret put up in the minute-book.

**JOHN CHEISLY** deceased, late husband of the respondent Mrs. Pow, was vassal in the lands of Kersewell, of which the appellant was superior; and he was also indebted to the appellant.

These lands being much incumbered, Mr. Cheisly's son and heir, the respondent John, did not enter as heir to him and there being several creditors upon the said estate who claimed by different titles, an action of ranking and sale for determining the preferences of the creditors, and for selling the lands for their satisfaction, was brought before the Court of Session.

Pending this action, the appellant brought a declarator of non-entry against the respondent, the heir, before the Court of Session, but he did not call the creditors as parties. The court in that action pronounced an interlocutor declaring that the said lands had been in non-entry, and in the hands of the appellant since the death of the last possessor, and were to continue in the appellant's hands till the entry of the heir; and that thereby the rents, duties, and profits of the said estate, from the 18th of January 1702-3, did belong to the appellant. But afterwards the appellant, having sundry sums due to him and those under whom he claimed, by adjudication upon the said estate, agreed and consented in his action of declarator to restrict his claim so far as only to remain a security for payment of the several sums due to him, he being first paid; and after making this restriction the Court gave judgment

ment accordingly on the 1st of January 1709, and in these terms decree was extracted.

Afterwards, however, in the process of ranking and sale, Mr. Montgomery, since deceased, then the second husband of the respondent Margaret Pow, who was entrusted with the ordinary management of the appellant's affairs, as his agent, and held his factory, consented and agreed on behalf of the appellant, when the preferences came to be adjusted, that the appellant's claims as a creditor by adjudications should be preferred to the adjudications of all personal creditors, but postponed to the claims of the creditors *annual-renters*, or creditors by voluntary real security. And accordingly the decree of ranking was pronounced on the 7th of February 1710-11, whereby the respondents, Pow, Montgomery, Walter Cheisly, and Bertram, amongst others as annual-renters, were preferred in payment to the appellant: This decree also was extracted.

The respondent Pow's title was by her marriage settlement, whereby she had 50*l. per annum* secured to her by her said former husband, John Cheisly, deceased, payable out of the said lands of Kersewell. The respondent Montgomery's claim out of the said estate was for arrears of the said respondent Pow's jointure, accruing in the lifetime of her last husband Mr. Montgomery, whose representative the respondent Montgomery was.

The claims of the other respondents, Walter Cheisly and Bertram, were likewise as annual-renters or creditors by real security on the said estate.

The appellant afterwards brought an action of reduction before the Court of Session, of the said decreet of ranking, as being pronounced while he was *absens reipublica causa*, and when he ought to have been decreed the first creditor as being entitled thereto, by his decree in the declarator of non-entry; and that though the person who appeared for him in the ranking did not claim the preference due to him, yet he had no special mandate for so doing, especially since that person had particular advantage by such neglect; and also that the said decree ought to be reversed because though it bears date the 7th of February 1710-11, yet several creditors had their titles determined, though not produced till after the 7th of February.

On hearing these reasons of reduction the Court on the 21st of January 1714 " repelled the reasons of reduction: that posterior  
" to the decree of ranking, the interests of Muir, and the Box-  
" master of Leith were taken in and ranked, and yet no new  
" decreet was put up in the minute book, in respect that  
" by the taking in and ranking of the said interests there was  
" no new scheme or class made in the said ranking, but the said  
" interests were only joined unto the classes of the creditors that  
" were formerly ranked posterior to the appellant; as also sus-  
" tained the defence of *res judicata* against the appellant, in re-  
" spect it was not now competent for the appellant upon the  
" said production made for him in the decreet of ranking to  
" crave of new a preference to the said creditors that were pre-  
" ferred

"ferred to the appellant in the said decree of ranking." The appellant reclaimed, but the Court on the 27th of February thereafter, adhered to their former interlocutor.

Entered  
5 March,  
1713-14.

The appeal was brought from "an interlocutor of the Lords of Council and Session of the 21st of January 1714, and the affirmation thereof," and from "several orders whereby the appellant is excluded from a preference to receive his just debt."

*Heads of the Appellant's Argument.*

By the decree of declarator of non-entry the appellant had an undoubted title, to all the rents and profits of the lands during the non-entry of the heir preferable to all other creditors, which would have amounted to much more than what he claimed, as due to him by adjudication; but the appellant restricted his large claim and used it only as a security to prefer him for his just debts. And though this decree had been extracted, yet in the action of ranking and sale, while the appellant was in London, attending the service of the House of Commons, and commission of accounts, and though he had not waived his privilege they proceeded in the said matter, and the decree of ranking was extracted before the appellant was in the least made privy to it. The appellant, then, being very much prejudiced by the decree in the ranking, and it being during his absence, the same ought to be reduced, and the appellant found to be entitled to the preference due to him by the decree of declarator.

Though the person entrusted with the ordinary management of the appellant's affairs, did neglect or rather wilfully omit to claim the just preference for the appellant which he had right to, yet that fault of his ought not to prejudice the appellant, since he had no special mandate from the appellant so to do.

It is plain, too, that the agent had his own private interest in view by thus neglecting the interest of the appellant. For he himself being a creditor upon the estate by an heritable right, and his wife having a jointure of 50*l. per annum* out of the estate, had he claimed the just preference for the appellant, he would entirely have sunk his own demand and endangered his wife's jointure. To save this, he gave a preference to all the creditors who claimed by a like title with his own to the appellant.

The decree under reduction cannot be looked upon as *res judicata*, because though it bears date the 7th of February 1710-11, yet three or four creditors are preferred in that decree, who do not so much as compare and produce their rights till some time after the date thereof; but it is impossible that creditors can have preference by a decree bearing date before their comparance or production of their rights.

*Heads of the Respondents' Argument.*

Supposing the declarator of non-entry so well fixed, that the same were unexceptionable, yet the respondent Pow, will be preferable to the superior on account of her jointure; for it is *vis juris* that the terce excludes non entry, as well as the courtly



of the husband, these being *usufructus* constituted by law, which do not require for their establishment the consent or deed of the superior, *quin ex jure publico descendunt*. The privilege of wives to terce remains with them, as to their conventional provisions, at least in so far as the said provisions do not exceed the terce. There is no law for depriving wives of the legal security for their conventional provisions, being within the limits of their terce as it is in the present instance.

But the appellant never proceeded further than a general declarator of non-entry, which is not sufficient to found a preference of debt; and that general declarator was in this case obtained by collusion between the superior and the heir of the deceased vassal. To that suit the respondents were neither summoned nor did they appear therein, and therefore the same cannot operate against them, nor create or found a preference to the appellant in their prejudice without the allowance of the respondents the creditors. For, had these respondents known of this suit it would have been very easy for them to have rendered the same ineffectual, by tendering to the appellant the arrears of the rents and services due to him as superior. And in June 1713, he got payment of, and gave a full and ample discharge, and acquittance for all the rents and services that were due to him as superior of the said lands, which was a plain passing from that decree.

The appellant in fact was not *absens reipublica causa*, when the suit first began, which continued for some years. And he was in Scotland several times during the continuance of that suit, and when the decree was extracted: but though he had been absent, yet that can be no objection, because he appeared by his agents in the said suit, and was party to it throughout. His ordinary lawyers were employed in that affair, and insisted in Court upon his titles, which by the law of Scotland implies a letter of attorney or mandate, and is equal to a personal appearance. And Mr. Montgomery had also a letter of attorney from the appellant, to act in all his affairs as if personally present.

The interest of Mr. Montgomery his agent to the respondent Mrs. Pow's jointure was only a temporary concern, determinable as to him, either by his or her death, and it is her this decree of ranking principally concerns, and she has only got the preference to which she was legally intitled: for she was not only preferable as life-rentrix, upon her prior infestment but upon this separate ground, that her jointure did not exceed her terce, which would have sustained her infestment against the declarator of non-entry.

The objection to the decree, that several creditors thereby have their rights and titles determined, though not produced till after the date thereof, is *jus tertii* to the appellant. The decree was obtained at his suit, and the error in date, if any was, is but an error arising from the extract or copy, taken from the record at his own charges, and upon his application. Upon a review and examination of the charges expended by Mr. Montgomery, in obtaining this decree, the appellant in Montgomery's book of accounts, gave him a full and ample

acquittance thereof. And he has ever since grounded his title in several suits upon that decree, according to his preference therein and has also received several sums of money thereupon; and now because in the event he gets not full payment, it is hard he should require the same to be reversed, which would occasion a new suit among the creditors, after it has been so long acquiesced in, nor is there any error in the date; for though these titles were produced after the 7th of February, and determined accordingly, yet that could be no ground to reverse the decree, because there was thereby no alteration made therein, and they are only thereby ordered to be added to the other creditors who had right by adjudications, and all posterior to the appellant, and they were included in the decree of ranking before the Court allowed the appellant to extract the same. Thus, none of the creditors were thereby any ways prejudiced, and the date is regulated by an express order of the Court.

Judgment,  
7 May  
1714.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutor, and orders, therein complained of be affirmed.*

For Appellant, *Rob. Raymond. Thos. Lutwiche.*

For Respondent, *P. King. John Pratt.*

John Cheisly the heir put in no answer to the appeal.

Case 23. Michael Russell of London, Merchant, - *Appellant*;  
John Cochran of Waterside Esq; - *Respondent.*

12th May 1714.

*Presumption.*—A bond is granted for a partnership debt to an individual creditor by one partner; the same partner afterwards executes an assignment of the partnership funds to the creditors in general, bearing to be in full payment and satisfaction of the partnership debts; this was recited in a power of attorney granted by the creditors; though the assignment was not executed by the other partner, it extinguished the bond to the individual creditor.

THE respondent, and James Home, Merchant in London, deceased, being co partners in trade, bought and purchased several quantities of goods from Michael Russell the appellant's father deceased; and became debtors to him in several sums of money.

After the dissolution of the said co-partnership, the respondent on the 21st of December 1689, executed a bond to the appellant's father, reciting that there was due to him by the respondent and the said James Home a sum of 695*l.* 13*s.* 5*d.* sterling, and it being most reasonable that the appellant's father should be fully and completely paid, without being put to any charge in prosecuting for the same, or any further trouble than to lend his name for recovering the same out of the partnership estate, therefore  
the

the respondent obliged himself to procure payment to the said Michael Russell, his heirs, or assigns, (they always lending their name as above,) of the said sum of 69*5*l. 13*s*. 5*d*. out of the partnership estate, or in default thereof, to pay the same out of the respondent's own proper estate before the 8th of the said month.

The bond was not paid when it fell due; but Home being thrown into prison, various letters were written by the appellant's father to the respondent on the subject of a proposal which Home had made to the partnership creditors of assigning the whole partnership funds to them, in satisfaction of their debts. The parties in the present appeal are not agreed upon the precise import of these letters; but the scope of them was to persuade the respondent to join in executing such assignment: and Home having declined to grant such assignment first, the appellant's father wrote the respondent, that he might execute it.

The respondent accordingly executed a deed, dated the 25th of January 1692-3, whereby, after reciting the several debts due to the appellant's father, and the said other creditors, the respondent did assign to him and them in full payment and satisfaction of their said respective debts, all the debts, money, goods and effects, belonging to the co-partnership. This assignment was transmitted by the respondent to one Ellis, a Merchant, in London, who shewed the same to the creditors. The appellant's father afterwards wrote to the respondent, that he had seen the assignment, and desired the respondent to send an account of the co-partnership estate, where it was, and how to be recovered.

The appellant's father, and the other creditors on the 20th of February 1693-4, executed a faculty or letter of attorney, which recited the said assignment made by the respondent, and did for the more effectual recovery of the debts and effects thereby assigned, constitute one George Watson, Merchant, in Edinburgh, their attorney, or factor, with full power to receive, sue, and give discharges for the same. An action was accordingly brought by Watson before the Court of Session to recover the partnership effects and sundry steps taken therein. Home, the respondents' partner, died without executing the said assignment.

The appellant's father lived near twenty years after these transactions, but took no step against the respondent upon the said bond. After his death the appellant brought an action, as his administrator against the respondent before the Court of Session upon the said bond for payment of the said sum of 69*5*l. 13*s*. 5*d*. with interest. The respondent pleaded for defence, that the said disposition or assignment executed by him to the creditors, bearing to be in full satisfaction of their respective debts, and which was accepted of by the appellant's father, was an innovation of the bond and equivalent to a discharge thereof.

The Court on the 24th of July 1712, "found that the disposition granted by the respondent to the appellant's said father and others, dated the 21st of January 1692-3 posterior to the bond granted by the respondent to the appellant's said father the 21st of December 1689, bearing expressly to be in

Case 24. Robert Lord Blantyre, and George Seaton of  
 Barnes Esq; - - - - - *Appellants;*  
 Mr. John Currie, Minister of Haddington, - *Respondent.*

1st June 1714.

*Third Court, Minister's Stipend.*—A Parish being disjoined the stipend formerly modified upon the whole, & allocated upon the original remaining parish, notwithstanding the use of payment had remained for 50 years, and the same after the disjunction as before.

It was not necessary to call the heritors of the new parish, as parties.

It was no sufficient defence, that the stipend still remaining was above the minimum settled by act of parliament.

A stipend is objected to as above the maximum of 1633, c. 19. but this stipend is allocated and decreed to be paid.

**M**R. Robert Ker, Minister of Haddington, the respondent's predecessor, in February 1650, obtained a decree of the then Lords Commissioners for plantation of Churches and valuation of Teinds, whereby a stipend of three chalders of wheat, and three chalders of barley Linlithgow measure, 400*l.* Scots, in money, and 100*l.* Scots for communion elements, was modified and settled on Mr. Ker, and his successors, ministers of the said parish. This stipend was not by any subsequent decree allocated or apportioned on the several heritors, or possessors of Teinds within the parish, but they by some voluntary allotment and proportions made and agreed to among themselves, paid the same to Mr. Ker and his successors for several years.

A considerable part of the parish of Haddington was afterwards, in 1692, by decree of the then Lords Commissioners for plantation of Churches and Valuation of Teinds taken away, and made a new parish, by the name of the parish of Gladsmuir. The stipend of the minister of Haddington, being thereby diminished about 20*l.* sterling, this last mentioned decree appointed the same to be made up out of the free Teinds of the parish of Haddington, which were more than sufficient for that purpose. But the then incumbent of the parish of Haddington, during his life, never demanded or received from the heritors more than the proportions of the stipend which had been in use to be paid before the disjunction of the new parish; and the proportions of the stipend paid formerly to the minister of Haddington, out of the lands dismembered from the said parish were paid to the minister of the new parish of Gladsmuir.

The respondent, was admitted minister of the parish of Haddington in 1704; and in 1707 he brought an action before the Lords of Session, as Commissioners for plantation of Churches and valuation of Teinds, against all the heritors and proprietors of lands and Teinds within the parish, for allocating and proportioning the stipend which had been modified in 1650. The heritors and proprietors having made appearance, insisted, that the Earl of Winton and others, within the new parish of Gladsmuir, who

who were defenders in the former action of modification, ought to have been made parties. The respondent made answers, and the Lords of Session, on the 16th of July 1707, "repelled the defence" and found that the whole heritors of the present parish being "called was sufficient."

It was afterwards contended, that no action ought to have been brought for augmenting a stipend, which the heritors for above 50 years had been accustomed to pay. After answers for the respondent, the Lords of Session, "found that the No 2m. use of payment by private paction, could not preclude a "locality."

It was further contended, that there still remained a very competent stipend, far exceeding the minimum settled by act of parliament, being 846*l.* 14*s.* 2*d.* Scots, with a manse and glebe, and 89*l.* Scots prebend's fee, and grafs of the church-yard, sufficient for a horse and two cows; and that if the stipend was diminished by the separation, the minister's trouble was also lessened. After answers for the respondent, the Lords of Session on the 26th of November 1707, "repelled the defence." And by an interlocutor on the 7th of Janaury 1707-8, "sustained the said decree of modification in 1650, and found that the stipend "modified thereby ought to have been allocated."

They afterwards remitted it to the Lord Ordinary, to hear parties upon their several rights and to prepare a locality, which having been prepared after sundry hearings before the ordinary, and reported, the Lords of Session on the 1st of February 1709, "approved of the locality made by the Lord of Fountainhall in "so far as the same continued the former use of payment as a "rule *pro tanto*, and for making up what the stipend was diminished by the erection of Gladsmuir, ordained the teinds to which "the heritors or proprietors of the lands had no right to be allocated in the first place, and the teinds of other men's lands in "tack in the next place." And of same date "ordained the "said stipend modified in 1650, to be yearly paid to the respondent, and his successors, ministers of the parish of Haddington," conform to the locality contained in the decree.

By this locality, the whole additional stipend was laid upon the teinds of the appellant, to which Walter Lord Blantyre had right as titular of the parish.

The appeal was brought from "several interlocutory sentences of the Lords of Council and Session, as Commissioners for planting of Kirks on the behalf of" the respondent. Entered, 24 April 1713.

Walter Lord Blantyre dying before the cause was heard, the House on the petition of the appellant Robert Lord Blantyre, his brother, and heir, revived the appeal, and ordered him to be made party thereto.

#### *Heads of the Appellants' Argument.*

The respondent, even after the dismembering of the parish had still remaining a very competent stipend, far exceeding what is de-

determined to be the *minimum* of stipends by act of parliament. For the stipend as it then was, after the disunion, was about 1200 merks, whereas by act of parliament, 1617, c. 3. the lowest stipend was enacted to be 500 merks, or five chalders of victual, and the highest 1000 merks or 10 chalders of victual. It is true, that by another act of parliament 1633. c. 19. the lowest stipend to be allowed is eight chalders of victual, or 800 merks, yet the commissioners appointed by that act, have a power granted them even to restrict these 800 merks, where they shall see just. But neither by that nor any other act, have the Commissioners any power or authority to augment any stipend above the said 1000 merks or ten chalders of victual, that being the utmost extent they were empowered to go: and if the proprietors of the said parish out of their tender consideration and regard to the greatness and extent thereof, and consequently of the incumbent's trouble, had condescended to pay him a stipend exceeding the highest allowed by act of parliament, there could be no manner of reason to oblige them to continue that; much more to augment their proportions; especially since after the disunion of the parish, the minister's care and trouble were diminished, and he had still a sufficient stipend and ought to be therewith satisfied.

The several heritors had been in use of payment of a certain quantity of stipend, for upwards of 50 years, the proportions therefore ought not now to be heightened; and consequently no augmentation granted to the respondent.

If any augmentation were necessary, or if the quota appointed by the decret in 1650 should still continue the rule, then the whole proprietors, both the present and those who were dismembered, should bear a proportion; for it was against reason to allocate upon any part the stipend modified against the whole. Since these heritors had procured the said new erection for their own conveniency and advantage, it is unreasonable that thereby the other proprietors should be subjected to the payment of a greater proportion than formerly, and that those who procured the said new erection, should continue still to pay only their former proportion.

Walter Lord Blantyre purchased the said teinds after the disunion of the said parish, and finding that the minister had at that time a sufficient stipend, he paid an adequate price and valuable consideration for them.

#### *Heads of the Respondent's Argument.*

If the respondent had had a decree of allocation, as he had not, and though a part of such allocated stipend had by the decret of erection been annexed to Gladsmuir, he could not have been deprived of his modified stipend. For though the Lords Commissioners had a power of augmenting, they had no power of diminishing minister's stipends; and so sensible were they of this, that by a clause in their decret of 1692, it was provided, that it should not *prejudice the former stipend of Hadding-*  
ton.

That

That stipend was about 846l. 14s. 2d. Scots, with a manse and glebe, what was suggested respecting the prebend's fee being untrue.

The stipend being modified, and no allocation or apportioning thereof legally established, such use of payment could not preclude the respondent of his right.

The heritors and proprietors of the parish of Haddington, as it stood at the commencement of this action, being only liable to the payment of the said stipend, there was no reason that any others should be made defenders.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutory sentences, or decrees therein complained of be affirmed.*

Judgment,  
1 June  
1714.

For Appellants, Rob. Raymond. John Pratt.  
For Respondent, P. King.

Hugh Wallace of Inglifton, - - - Appellant; Case 25.  
Sir Alexander Hope of Kerse, Bart. - Respondent.

3d, June 1713.

*Jus Exigendi.*—A Lady's jointure being secured on certain heritable debts but no infeftment taken, the husband's estate is forfeited during the *Usurpation*, but being afterwards restored to his heir, reserving the claims of the widow and others, and ordering those to refund, who had received grants out of the estate; the assignee of the widow's executrix had no *jus exigendi* of the sums received by these grants.

*Forfeiture under Cromwell's Usurpation.*—The Earl of Forth, and Bramford being forfeited, and his estate seized, a bona fide creditor of the then government, is paid his debt by a grant out of the Earl's estate: on the restoration, the Court of Session found that the heir of such creditor was obliged to refund, but their judgment was reversed in the parliament of Scotland.

This last head is only mentioned incidentally but not decided in this case.

SIR Patrick Ruthven, Knight, afterwards Earl of Forth and Bramford, by deed bearing date the 29th of March 1637, in consideration of the great love and affection he bore to Dame Clara Barnard his then wife, and for her better provision and maintenance in the kingdom of Scotland, where she was a stranger, settled an annuity of 2000 merks Scots, *per annum*, on his said lady for her life payable out of his real and personal estate, at the terms of whitsunday and martinmas by equal portions; the first payment thereof to commence at such of the said terms as should happen next after his decease; and for the better securing the payment thereof, he did by the same deed assign to his said lady, so much of the interest of the sum of 110,000 merks due to him by the Earl of Erroll, and of the sum of 50,000 merks due by the Earl of Southesk, for which he had heritable security, over their respective estates, as would satisfy the said annuity. This assignment to Lady Ruthven never was completed by infeftment in her favour,

The

The said Earl of Forth, and Bramford in 1645, was declared to be forfeited by the then government, for his adherence to the royal cause, and his estates were seized into their hands, several gifts were made by them out of the same to different persons, and in particular one of 23,036 merks, to Sir Alexander Hope of Kerse, the respondent's grandfather, which he received out of the said debt due by the Earl of Erroll.

The Earl of Forth, and Bramford died under the said forfeiture in 651, leaving the Countess his widow, and one daughter the Lady Jane Ruthven, afterwards married to the Lord Forrester, surviving him. In 1661 an act of parliament was passed, rescinding and annulling the said forfeiture, *to the end* the heirs and executors of the said Earl, might enjoy all such estate as belonged to him, as if no forfeiture had been. This act was opposed in the extracting and execution thereof, by Sir Alexander Hope and others, who had intromitted with the estate of the said Earl, and such extracting and execution were suspended by several acts of parliament for several sessions following (a), but on the 20th of August 1670, another act of parliament was passed, whereby the said act rescissory was ordained to be extracted; which was accordingly done.

An agreement was soon after entered into between the Countess of Forth and Bramford, and the Lord Forrester and his Lady, for an equal division of the said Earl's estate between them. But a representation being made to parliament in 1672 by Lord and Lady Forrester and Edward Ruthven their son, stating that they had been surprised into the said agreement, another act was passed, whereby his Majesty and estates of parliament declared their intention to have been, that for supporting the honour of the said Earl's family, he the said Edward Ruthven, the son of the Lord and Lady Forrester, should be entitled to the whole estate of the said late Earl; and therefore the agreement was thereby rescinded and made void, decreeing the said Earl's estate to belong entirely to the said Edward Ruthven, reserving a life-rent of the half thereof to Lord and Lady Forrester; and saving to the said Countess any right of terce due to her as relict, or any provision in her favour by contract of marriage with her said husband, and any action competent to her for such sums as she had expended profitably for behoof of the said Lord Forrester or his Lady.

An action was afterwards brought before the Court of Session against Sir Alexander Hope the respondent's father, for the said 23,036 merks, received as before mentioned, with interest for the same (b). In this action a decree was made on the 15th of November 1672, decerning Sir Alexander Hope, the respondent's father, to make payment of the said sum of 23,036 merks and 14,000l. Scots of interest for the same, to that time, with interest

(a) These expressions shew that acts of parliament of that nature were considered in Scotland, at that period, only in the nature of decrees.

(b) Stair's Decisions, 9th January 1672. Sir Geo. Mackenzie's Works, vol. i. *Pleadings*, p. 52. No. 8, folio edit.



to grow due in time coming to the said Edward Ruthven, reserving the liferent of the half thereof to the Lord and Lady Forrester, and also reserving to the Countess what she could claim by her marriage contract in terms of the said act of parliament; and likewise decerning that the said Countess, or Lord and Lady Forrester should not bring any action against the respondent's father, for what he should pay to the said Edward Ruthven. And a subsequent decree was given against the respondent himself to the same effect in 1677.

. In 1690 the respondent brought his appeal before the parliament of Scotland (according to the method then practised;) against the said decrees of 1672 and 1677, upon the ground that his father had been a bona fide creditor to the usurping government and that he had received the said sum as payment of a debt, and not as a gratuity and that though the act of parliament did appoint restitution to be made by all such as had received any of the said sums of money, though even by warrant from the government, yet that was to be understood of such only who had received the same gratuitously, and not of such as were creditors who were not concerned out of what fund the government paid them; and in this case the money was paid to the curators of the respondent's father when a minor. This matter having been several times under the consideration of the said parliament, they on the 12th of July 1695, remitted the same to the Court of Session to review the said decrees, and determine finally therein. The cause was heard several times before the Lords of Session, and on the 18th of February 1697 (a), the Court sustained the reasons of reduction against the decrees of Session obtained in 1672 and 1677, and reduced the same particularly upon this ground, that in the said decrees this defence was repelled, that *qui suum recipit conditione non tenetur*, and that the respondent's father being creditor to the government *bona fide* for the time for onerous causes, what he had received was for payment of his own debt by warrant and order from the government then having authority, so that in effect it was the government who was receiver and not the respondent, who was not bound to take notice out of what funds he got his payment. And afterwards the Court, on the 16th of February 1698, adhered to their former interlocutor, and absolved the respondent from any further payment of the sums craved by him to be reduced, than what was already paid, and reduced the foresaid decrees as to the surplus, without prejudice to the respondent to insist for repetition of what he had paid.

The Countess of Forth and Bramford executed a testament on the 21st of August 1676, in which she appointed Janet Urrie her executrix, and died in August 1679. Janet Urrie having confirmed the said testament, did, by a deed on the 3d of May 1680, for the causes therein specified, assign to the appellant all her right and title to the arrears of the Countess's annuity, and in and to

(a) *Vide* Fountainhall of that date.

the bond of provision, the decree of 1672, and all other writs and evidents relative to the same.

In November 1713 the appellant commenced his action against the respondent, before the Court of Session, for payment of the said sum of 23,036 merks, and 14,000*l.* Scots as the interest thereof to the 15th of November 1672, with all interest that had grown due since that time, or so much thereof as might be sufficient to satisfy and pay the appellant what was due to him in respect of the said annuity, amounting in the whole to the sum of 64,000 merks and upwards. To this action the respondent appeared and made defences; and the Court, by interlocutor on the 16th of February 1714, "Found that by the act of parliament and decree of the Lords in 1672, Edward Ruthven had the *jus exigendi* of the sums due by the respondent."

The appeal was brought from "an interlocutor or decrees of the Lords of Council and Session of the 16th of February 1714."

Entered,  
22 April  
1714.

*Heads of the Appellant's Argument.*

The first action against the respondent's father was brought by the Countess; and in that action Edward Ruthven, appeared by his curator for his interest.

Both in the act of parliament, and the decree subsequent thereto, the Countess's right of terce or by contract of marriage was sufficiently reserved to her; so that her bond of provision, which came in place of the marriage contract, was thereby rather strengthened than weakened. Her legal provision, therefore, was supported by the saving clause, which could bear no other interpretation than the reserving and establishing those rights in their original force, and was wholly useless in any other sense; for the Countess, without such reservation, might have sued the said Edward Ruthven, and all others who had intromitted with the said Earl's estate. The said decree, too, was only relative to and to be explained by the said act in 1672; by which, though the said Edward Ruthven was preferred to the sums, to which the Countess before that act had right by her contract, and to the fee of the whole sums, and the right of exacting payment thereof established in his person both by the act and decree; yet that right was expressly burdened with the reservation in the Countess's favour. And more especially as to the interest of the sums in question, received by the respondent's predecessor, there can be no doubt of her preference, for the same had been particularly assigned to her by her said deed of provision, and were reserved to her by the said act and decree. The preference in the decree being only in respect of the principal sum, ought not to prejudice her as to the interest thereof.

*Heads of the Respondent's Argument.*

The Countess did not produce any marriage contract, or claim her terce against Lord and Lady Forrester, Mr. Ruthven their son, or the respondent, though she lived till 1680. Neither did

her executrix, or any claiming under her, bring any action till November 1713, being more than 50 years after the forfeiture was reversed, though by the laws of Scotland the lapse of 40 years establishes a limitation of prescription. On the contrary, the said Edward Ruthven brought his action against the respondent's father in 1672; and, in obedience to the decree pronounced in that action, the respondent's father and he himself made payment to Edward Ruthven at several times of about 1300*l.* sterling.

The act of parliament and decree of the Court of Session in 1672 do expressly ordain the right of all sums of money and estate belonging to the Earl of Bramford, or that might be recovered by virtue of the act of restitution, to be paid to the said Edward Ruthven, as the party having the best right thereto, without distinction of principal or interest. In the decree of 1672 the respondent's father is decreed to pay, not only the principal sum of 23,036 merks, but likewise the interest, then amounting to 14000*l.* Scots, and the interest that should afterwards grow due. And by the decree in 1677 the payments made by the respondent and his father to the said Edward Ruthven are expressly imputed to the payment of the interest, and not of the principal sum, which could never have been done, if they had intended by the reservation in the Countess's favour to entitle her to sue for and receive the interest equivalent to her annuity. But the decree in 1677, notwithstanding the reservation in favour of the Lord and Lady Forrester of the liferent of half of the sums, directed the respondent's father to pay the principal and interest entirely to the said Edward Ruthven. The reservation in their favour could afford them action against Edward Ruthven; and by the same reason the reservation in favour of the Countess could not entitle her to an action against the respondent for the interest; but he being obliged to pay the same to Edward Ruthven, the Countess had an action against him; and this the more especially, since the Countess's right was but a personal obligation not completed by investment.

If the said reservation had not been made, it was a question if Edward Ruthven, in whom the estate was vested by an act of parliament, and in effect gifted to him, would have been obliged in the performance of the Earl of Forth and Branford's deeds.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutor or decree therein complained of be affirmed.*

Judgment,  
3 June  
1714.

For Appellant,  
For Respondent,

Rob. Raymond, P. King.  
J. Jekyll. John Pratt.

Case 26. John Scott of Hedderwick Esq; - - - *Appellant*;  
 The Magistrates and Town Council of  
 Montrose, - - - - - *Respondents*.

5th June 1714.

*Tand Court.*—An Action of valuation being suffered to fall asleep, the minister lets a tack of the teinds to the magistrates of a royal burgh, and the action being awakened, these magistrates ought to have been called as parties.

A decree of valuation, obtained on a mistake as to the rental, set aside, and the mistake rectified.

**T**HE teinds of the appellant's lands of Newbigging were, by a decree made by the commissioners for plantation of churches and valuation of teinds, in February 1648, settled at five bolls of barley and 11 bolls of oatmeal. These teinds were anciently part of the revenue of the Bishop of Brechin; and, upon the abolition of episcopacy, that revenue became vested in the crown. On the 28th of June 1701, his then Majesty King William, by his grant, settled a stipend out of the same payable to the first minister of Montrose, and particularly the said five bolls of barley and 11 bolls of oatmeal, payable out of the said lands of Newbigging as a part thereof.

In February 1700 the appellant commenced an action before the then commissioners for plantation of churches and valuation of teinds, for a valuation of the teinds of his said lands of Newbigging; and he called the then officers of state, and Mr. Arratt, the first minister of Montrose, as defenders. After some steps taken in this action, but no appearance made for the defenders, it was suffered to fall asleep, and continued so for several years.

In the mean time, on the 8th of May 1704, Mr. Arratt the minister, upon a contract made between him and the respondents, ratified an assignment to them before made, bearing date the 17th of September 1698, of all the teinds due and payable to him by the said decree in 1648; and also in corroboration thereof did set and in tack let to the respondents and their successors all the stipend and teinds due and payable to him by the said decree in 1648, and by virtue of the said grant from his Majesty, or otherwise howsoever: in consideration whereof the respondents became bound to pay Mr. Arratt a certain annual stipend. The respondents, in consequence of their right acquired from the minister, received the teinds of the said lands of Newbigging from the appellant for several years.

On the 21st of April 1707, the appellant awakened his action of valuation by a new summons to the said Mr. Arratt and the officers of state; but the respondents were not cited as defenders. No appearance was made by the parties called, and in January 1709 a commission was granted to the provost, or any one of the baillies of Montrose, to take the depositions of such witnesses as should be adduced for the appellant to prove the yearly value of  
 his

his lands. This commission was executed by one of the baillies, who examined several witnesses as to the rental, and the deductions claimed by the appellant, amounting to 88*l.* 13*s.* 4*d.* Scots *per annum*. The commission being reported, with the depositions taken thereon, to the Lords Commissioners, the appellant, on the 16th of February 1709, obtained their decree in absence, valuing the said lands of Newbigging at 223*l.* 13*s.* 4*d.* Scots *per annum*, and settling the teinds thereof at 44*l.* 14*s.* 8*d.* Scots *per annum*, being a fifth part of the yearly value of the said lands.

Soon afterwards the respondents brought an action before the Lords of Session as commissioners for plantation of kirks and valuation of teinds, for reduction of the said decree obtained by the appellant, for that all parties having interest, and particularly the respondents, had not been cited by the appellant therein. To this action the appellant made defences, and the Lords commissioners, on the 2d of July 1712, “found that the principal process of valuation having slept, and the defender having appeared of the minister’s assignment to the pursuers by paying his teinds to them before the wakening thereof they ought to have been cited by a process; but before reducing ordained the respondents to give in a rental of the said lands, that it might appear whether the said valuation was made with a diminution of the rental or not.”

The respondents, in the further course of the action, stated, that they might have proved the rental of the said lands to be 100 bolls and 20 merks money, and that the interrogatories which had been put to the witnesses were contrived for diminishing the rental on pretence of allowances which the appellant had at that time made to his tenant after two years of dearth and scarcity. The Lords, in December 1712, allowed the respondents yet to prove, that the said lands could, at the time of leading the said valuation, pay 100 bolls over and above the deductions allowed in the said decree; as also to prove the value of the said deductions at that time; and to the appellant to make what proof he could in support of these deductions.

A commission was thereupon granted, and sundry witnesses being examined, and a report made to the Lords Commissioners, they by interlocutor on the 11th of February 1712-13, “found that the respondents had not proved in terms of the act; but found that in their former decree the allowances made in the said valuation were deducted from 80 bolls, which ought to have been deducted from 100 bolls, and therefore reduced the said decree as to so much thereof, and declared the teinds of the appellant’s lands of Newbigging to be 61*l.* 8*s.* Scots for that year, and in all time coming.”

The appeal was brought from “an interlocutor or decree of the Lords Commissioners for plantation of kirks and valuation of tithes of the 2d July 1713, and of a sentence or decree of the said Lords on the 11th of February following.”

Entered,  
15 March  
1713 14.

*Heads of the Appellant's Argument.*

The appellant having summoned every person who had interest in the said teinds at commencing his action, as law requires, and particularly the minister, he was not obliged to have summoned every person to whom the minister's right might be conveyed. The appellant conceives, that his paying the teinds to the respondents upon their right from the minister does not alter the case, for it was a matter of indifference to the appellant to whom he paid the teinds, and no doubt he must have paid to the minister's attorney if he had so ordered. The respondents themselves were employed by the Lords Commissioners to examine the witnesses, who proved the value of the appellant's estate and teinds, so that they were fully apprised of the action, and might have appeared and pleaded for their interest if they had thought fit. Never, before the appellant's case, was any person obliged to summon all to whom the defender might think fit to make over his right, during the dependance of a suit: and, by the civil law, defenders are expressly disenabled from conveying their rights to a greater or more powerful party, during the suit.

(The appellant also gives a statement of facts, said to be proved on his side, which are traversed or totally denied on the other side.)

*Heads of the Respondents' Argument.*

All the parties having interest, and particularly the respondents, who by virtue of their said contract and lease were in possession of the said teinds, and to whom the appellant had paid the same, not having been made parties to the appellant's action of valuation, the decree pronounced therein was null and void. And though it might not have been proper to have named them in the summons of wakening, yet since their right was sufficiently known to the appellant he ought to have cited them by another process. And their contract was so far from being a faculty or letter of attorney, that it was an absolute lease; and in all actions of this nature lessees are to be called. In the present case there were no persons who had any right to defend but the respondents; the minister was not concerned how the teinds might be valued, for the respondents were obliged to pay him the same rent or stipend during his incumbency, without regard to any valuation, and therefore the minister never made any appearance to the appellant's action. Though one of the bailies of Montrose did execute the commission in that action, he did it not as one authorised by the respondents, or as a magistrate of the burgh, but as a private person without their concurrence; and therefore this ought not to prejudice the respondents.

(The respondents also give a statement of facts, said to have been proved on their side; as nothing can be given distinctly of these, the statements are not detailed on either side.)

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors or decrees therein complained*

*plained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 40l. for their costs in this House.*

For Appellant, - *Edw. Northey, John Pratt.*

For Respondents, *Rob. Raymond, P. King.*

Grace and Rachel Douglas, Daughters of the deceased James Douglas of Earnslaw, for themselves and as Assignees of Mr. Alexander Douglas their Uncle, and Lieut. Robert Douglas their Brother, - *Appellants;*  
John Montgomerie, Hugh Paterson, James More, and others, Creditors of the said James Douglas deceased, - - *Respondents.*

**Case 27:**

Dalrymple,  
21 & 29  
Nov. 1705.  
Fountain-  
hall,  
29 Nov.  
1705.  
Forbes,  
21 & 29  
Nov. 1705.

18th June 1714.

*Fiar.*—An estate being settled by an heiress to her husband and herself in conjunct fee and life-rent and the heirs to be procreated between them in fee, whom failing to the husband, his nearest lawful heirs and assignees; the husband was *fiar*.

*Donatio non presumitur.*—The fee taken up by a daughter as heir to her father, where a disposition had been made to a son (deceased), upon which infestment had followed, but never clothed with possession nor recorded.

*Adjudication.*—A charge being given to a son to enter heir to his uncle and mother, and adjudication being led thereon; but the father being afterwards found to be *fiar*, the first adjudication is reduced.

The said son refusing to subject himself to his father's debts, has no title to quarrel the adjudication led of his father's fee.

**JOHN GRADEN** of Earnslaw, in the county of Berwick, the grandfather of the appellant, executed a disposition of that estate to his son John in fee, with a clause of redemption on payment of a sum of money. Upon this disposition to John the son, *saifin* was taken, but never recorded; and he died before his father, under age and without heirs of his body.

The father dying also, Grace Graden his daughter served herself heir to him as last vest and seised in the estate, and was thereupon infest on the 1st of January 1664. Afterwards, by contract of marriage, dated the 27th of January 1668, between Mr. James Douglas, and the said Grace Graden, in consideration of a marriage intended to be had between them, James Douglas obliged himself, his heirs, &c. to lay out 20,000 merks in lands or other securities, to be settled to himself and the said Grace in conjunct fee and life-rent, and to the heirs of their two bodies: and the said Grace Graden also thereby disposed the said lands of Earnslaw, "To Mr. James Douglas in life-rent and to the heirs to be procreated between the said Grace Graden and him" in fee, whom failing to the said Mr. James Douglas, his own

"nearest heirs and assignees whatsoever, with the provision and condition of the said Grace Graden her own life-rent."—In the procuratory of resignation and precept of *fasine*, this destination was not verbatim repeated, but these mentioned, that *fasine* was to be given "To Mr. James Douglas and Grace Graden, and longest liver of them two, in conjunct fee and life-rent, and the heirs to be procreated between them, in fee, whom failing to the said Mr. James, his nearest and lawful heirs and assignees." This marriage accordingly took effect, and on the 28th of February 1668, a crown charter was obtained of the said lands of Earnslaw, settling the same in manner as in the said procuratory of resignation and precept of *fasine*; and upon this charter infestment was taken upon the 17th of April 1670, and the instrument of *fasine* duly recorded. Afterwards on the 1st of October 1673 resignation was made by Grace Graden in the hands of the crown for a new infestment to the said James Douglas and Grace Graden *in conjunct fee and life-rent*, and the heirs to be procreated between them in fee, whom failing to the said Mr. James, his nearest and lawful heirs and assignees; and in terms thereof a new charter was procured from the crown and infestment taken thereon and also recorded.

James Douglas having contracted considerable debts, which came to be vested in the person of one Alexander Paterfon, he by an assignment, on the 15th of February 1686, made over the rents of the said estate to Mr. Paterfon, at the then constituted rental, (which was inserted therein) for payment of the interest of the said debts in the first place, and afterwards towards satisfaction of the principal sums; with a power to Paterfon to make and renew tacks without diminution of the said rental. Paterfon afterwards brought an action of adjudication against James Douglas on several debts which he claimed as due to him; and on 8th of November 1698 obtained decret therein adjudging the said lands to him, and he thereupon also obtained a charter of adjudication from the crown.

James Douglas soon after died, leaving issue of the said marriage a son Robert, and the appellants Grace and Rachael Douglas.—The said Mr. Paterson being indebted in considerable sums to the respondents, he conveyed his right to the said lands to his nephew Robert Anderson, with a proviso for payment of his debts. This Robert Anderson was served heir to Mr. Paterfon after his decease, and obtained a charter of adjudication in his own favour on the 1st of March 1700, on which he was infest; and he afterwards conveyed all his right to the said lands, under a similar proviso with that above-mentioned to Alexander Anderson his brother, and this Alexander was duly infest therein.

An opposition, however, was now started to the rights of the creditors of James Douglas. Robert his son, on the 12th of December 1699, granted a bond to Mr. Alexander Douglas his uncle for the sum of £2000 sterling. Upon this bond Alexander the uncle gave Robert a charge to enter heir in the said lands of

Earnslaw



Earnshaw to John Graden his uncle and Grace Graden his mother; and upon Robert's renunciation, he obtained decree of adjudication in his favour.

And the said Alexander Anderson brought an action before the court of session to reduce this last mentioned adjudication; and in this action he called the said Alexander Douglas and Robert Douglas as defenders. It was contended on the part of these defenders, that by the marriage contract between the said James Douglas and his wife, the lands of Earnshaw were only conveyed to him in life-rent; and consequently that no debts contracted by him, nor any adjudications thereon could affect the estate in prejudice of the heirs of the marriage in whom the fee was vested. After sundry proceedings, the court on the 20th of November 1705 "found, that by the contract of marriage with "the charters and sasines following thereupon, Mr. James "Douglas the husband was fiar of his lands and others contained "in the said contract."

It was then contended on the part of the defenders, that though by virtue of the marriage contract, the husband might have the fee of the estate, yet his only right being by conveyance from Grace his wife, she herself had no right, for she was only served heir to John Graden her father, but the father had before that time conveyed his estate to his son, who was infant therein; and this estate was now *in hereditate jacente* of the son, and could not be conveyed by Grace to her husband:—Upon this point the court on the 29th of November 1705 "repelled the defence "founded on the disposition granted by John Graden to his son, "with the sasine following thereupon, in respect the same were "not clothed with possession, and the sasine not registrate, and "therefore reduced the said rights, and preferred the pursuer "Mr. Anderson, and the creditors of Mr. Alexander Paterson." The defenders Messieurs Douglas reclaimed, and insisted further that those claiming under Paterson should count and reckon for their intromissions with the estate:—The court on the 7th of December 1705 "adhered to their two former interlocutors, but "decerned the said creditors to produce the grounds of their "debts and adjudications thereupon, and allowed the petitioners "to see the same, and remitted to the lord ordinary to hear the "objections against the said adjudications and the allegations "of payment of the sums contained in Mr. Alexander Paterson's "adjudications."

Parties having accordingly gone before the ordinary, it was objected, that as the defender's adjudication proceeded upon a charge to enter heir to John and Grace Graden his uncle and mother, the same was void; and that unless the defenders would subject themselves to the payment of James Douglas's debts, or serve themselves heir to him, they had no title to question the rights of the creditors. The Lord Ordinary, on the 22d of February 1706, "found that the defender's adjudication proceeding "only upon a charge to enter heir to John Graden the defender's

“uncle, and Grace Graden the defender’s mother, and that the  
 “disposition of John Graden the father to John Graden the son,  
 “the defender’s uncle, and saline thereon being already reduced,  
 “and that the lords have found that the father had right to the  
 “fee of the estate, and not the mother, therefore the defender’s  
 “adjudication fell in consequence; and in regard the defenders  
 “refused to subject themselves to the pursuer’s legal diligences,  
 “and pay off the debts upon this event, therefore reduced the  
 “said adjudication, and decerned that the pursuer had the only  
 “good and undoubted right of property of the said lands of  
 “Earnslaw, and ordained him to be entered into the quiet pos-  
 “session, and receive the rents thereof, and decerned that the  
 “defenders should not receive any of the rents and profits of the  
 “said lands, or any part thereof, they having no right thereto.”  
 And the defenders having reclaimed against this interlocutor, the  
 same was adhered to by the whole court, and decree was ex-  
 tracted on the 22d of February 1706.

The respondents being creditors of Alexander Paterfon and  
 Robert Anderson before mentioned, afterwards adjudged the  
 said lands of Earnslaw, and procured a charter thereon from the  
 crown, upon which they were infest. They afterwards brought  
 an action of ranking and sale, and called the whole creditors of  
 James Douglas and of Mr. Paterfon, and all claiming under them:  
 And the appellants, as creditors of their father by bond of  
 provision, now appeared contending that the respondents by  
 receipt of the rents had been fully paid their debts. The  
 court granted a joint commission to both the appellants and re-  
 spondents, to prove the yearly value of the said lands of Earnslaw  
 and others, and how many years purchase the same might be sold  
 at, and the deductions therefrom, and allowed the respondents to  
 prove the said Mr. James Douglas, Mr. Alexander Paterfon, and  
 Mr. Robert Anderson, bankrupts, and ordained the several credi-  
 tors to depone to the verity of their respective debts. Several  
 witnesses for the respondents were examined, and after sundry  
 proceedings the court found “that the debts exceeded the value  
 “of the estate, and found, that Mr. James Douglas was bank-  
 “rupt in 1578/. and that Mr. Alexander Paterfon was bankrupt  
 “in 850/. and that Robert Anderson was bankrupt in 500/.  
 “beyond the value of their estates, and therefore preferred the  
 “respondents to the appellants, and found the appellants’ right  
 “null.” The preferences of the creditors were afterwards ascer-  
 tained, and to these interlocutors the court on several occasions  
 adhered when reclaimed against by the appellants: decree was  
 extracted on the 23d of February 1711.

In pursuance of these proceedings the said estate was sold, and  
 the respondent James Moore purchased the same at a publick sale,  
 paid the price to the creditors, and obtained a charter from the  
 crown on which he was infest.

The appeal was brought from “several interlocutors or decrees  
 “of the Lords of Council and Session, made on the behalf of  
 “James

" James Moore for himself and as assignee of Hugh Paterfon, and  
" of others."

*Heads of the Appellants' Argument.*

By the marriage contract between James Douglas and Grace Graden, there was no greater estate granted to the said James Douglas than for his life only. By the whole tenor of the said contract, and more especially by the principal or granting clause therein, whereby the grantor's intention is best seen (other collateral clauses being left to the writers who often insert words therein as they think fit) this appears to have been the true intent and meaning of the said Grace Graden the grantor. The debts of the father of the appellants ought not, therefore, to affect the inheritance of the said estate in prejudice of Robert Douglas the heir of the marriage.—*Conjunct fee*, especially where the estate comes by the wife, as this does, in its largest extent signifies nothing but life-rent. Were this otherwise, in the present case, it is explained and qualified by the addition of the words *or life-rent*, and by the subsequent limitations to the heirs of the marriage in fee, and in default of such issue to the heirs of the husband, which were wholly useless, if by the words of the first limitation the husband had an estate in fee. When any doubt exists to whom an estate did first belong, the same is presumed by law to belong to the man; but here it is evident, the estate did first belong to the wife: and a husband may have a conjunct fee of his wife's estate, but not an absolute fee, and at most is only a trustee for the heir of the marriage until he exists. The heir, upon his existing, has a *jus quesitum et proprium* in the inheritance of his mother with the burthen of his father's life-rent, and may force the father to aliment him out of the life-rent; and the heir, after the death of his father and mother, needs only to be served heir of line and provision to his mother as dying last vest and seised in the absolute fee, and could never thereby be made liable to the payment of his father's debts to whom he does not succeed as heir.

With regard to the resignation, charter and sasine in 1673; the wife was certainly denuded of all her right to the inheritance by the marriage contract; and since, pursuant to that contract, resignation, charter and sasine had been made and granted five years before this second resignation, the second resignation was null in itself, being obtained without any consideration from one who had no right.

But even supposing (which is contrary to the fact,) that by the words of the marriage contract an estate in fee might have passed, if the said Grace Graden had been seised of such an estate; yet she herself could not grant any estate to her said husband. She herself had no other estate in the said lands, than what she claimed as heir served to her said father, who had no manner of right therein; for the fee thereof was wholly vested in the said John her brother, who died seised thereof; and as she did not serve herself heir to him, who died last seised her

service to her father was void. And this allegation was supported in the Court of Session, by a decision of their own in another case exactly parallel (a).

(The appellants also state, that Alexander Paterfson had been fully paid his debts, by receipt of rents and profits; they make objections to the rental proved before the Court of Session, and to this decree finding the legal expired, and refusing to give the appellants their option to redeem.)

*Heads of the Respondents' Argument.*

By the marriage contract, the said lands were conveyed to Mr. Douglas in fee. Even by the dispositive clause in the contract of marriage, if the question had turned upon that clause alone, the husband is clearly made *fiar* of the estate. Though in this clause of the said contract, the lands are at first only conveyed to the said James Douglas in life-rent, yet this clause by limiting these lands, in remainder to the nearest lawful heirs, and assignees of Mr. Douglas, with a reservation to the said Grace of her life-rent, without doubt establishes the fee in him; for she being only life-renter, and the fee remaining in him and his heirs, the estate of inheritance being necessarily somewhere must be in him: and this clause if doubtful is to be explained by the other clauses of the contract.

But though that matter were not so clear, yet the charter under the great seal and *fasine* following thereupon, which are matter of record, having established the fee in Mr. Douglas's person, the creditors were in *bona fide* to lend money to him, since it appeared upon record that the fee of the estate was in him, and he not tied up either from contracting debts, or alienating the lands. Nor had the creditors any notice of the contract of marriage, or of the dispositive clause therein, nor could they since it was not recorded, and of consequence could not be bound by any clause therein contained, though clearly against them, as this clause is not. And Mr. Douglas did during his life grant leases, and exercise all other acts of property as any other in whom the fee of an estate is could do.

Grace Graden being served heir to John Graden her father in 1663, and retoured, as appears upon record, that service cannot now be questioned, since by act of parliament 1617. c. 13., no service or retour is questionable unless within 20 years; and it was more than 40 years before her service was quarrelled. Besides, the disposition by John Graden, the father to his son when under age, with the *fasine* thereon, were revokable at pleasure; and the father notwithstanding thereof continued absolute proprietor of the estate, and granted heritable securities thereon, and leases thereof, and did all other acts of property, even during the son's life, much more after his death, which happened in the father's life-time. So that the son dying before the

(a) Dirleton's Doubts and Decisions, voce *Fiar*, Duke and Dukes of Monmouth.

father,

father, and a minor, and these deeds never being delivered or out of the father's custody, the father notwithstanding of the deed to the son, was *vest and seised* in the property of the estate, and the son's right vanished, and consequently the daughter was in the right to serve heir to her father and take no notice of the son. The Court of Session decreed the same in a case *Rose Fincham*, against *Muirhead of Bradisholm*, which was affirmed upon appeal by the House of Lords. Indeed she could not do otherwise than she did, for she could not know of the disposition to the son, or the *saſine* thereon, for neither of them were recorded, nor was the son ever in possession, but died under age, and by the act of parliament 1617. c. 16., all *saſines* are declared void as against third parties, if not registered within sixty days after they are taken. But this *saſine* never was registered and consequently neither the daughter nor the creditors could know any thing of it; and as she was served heir to her father who died seised and possessed thereof, Mr. Paterſon and the other creditors were *in bona fide* to lend money to Mr. Douglas, who claimed under the said daughter, and stood publicly infest by virtue of a charter under the great seal.

No. 2. of  
this Collec-  
tion.

1617, c. 16.

(The respondents also traverse or deny the facts stated by the appellants, with regard to the payment by receipt of rents and as to the proof of the rental.)

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutors or decrees therein complained of be affirmed.*

Judgment,  
18 June  
1714.

For Appellants,	<i>P. King. N. Lechnere.</i>
For Respondents,	<i>Rob. Raymond, John Pratt.</i>

Sir Robert Home, Bart.	-	-	-	<i>Appellant;</i>	<b>Case 28.</b>
Sir Patrick Home, Bart.	-	-	-	<i>Respondent.</i>	

1<sup>st</sup> July 1714.

*Sequestration.*—A sequestration, granted of an estate, where a person was in possession by virtue of a tack from his father for payment of debts, adjudications in his person with expired legals, and a disposition from an elder brother, which, though reduced for fraud and circumvention, was still to stand as a security for the onerous cause thereof.

*Presumption.*—From circumstances of presumption a person is made to count and reckon for property, which with his consent had formerly been conveyed by a weak elder brother to another person.

**A**FTER the judgment was given in the former appeal (No. 15. of this collection) the parties returned to the Court of Session, and sundry proceedings were had in the action of count and reckoning. On the 24th of February 1713, the Lord Ordinary found Sir Patrick the respondent liable both for the real and personal estate contained in the disposition, and discharge granted to him  
in

Act of Sederunt.  
22 Nov.  
1711.

in terms of the judgment of the House of Lords, and ordered him, in terms of an interlocutor of the 18th of November 1691, to account from Martinmas 1671, and to give in a charge against himself, with his discharge and vouchers according to the late act of Sederunt. The respondent having reclaimed, the Court on the 2d of July 1713, adhered to the former interlocutor with an addition in these words, viz. "in so far as concerns the whole subject disposed by Sir John Home to Sir Alexander his son, and by Sir Alexander with consent of the respondent to George Home of Kaims."

The appellant thereupon petitioned the Court to have the estate sequestrated, and a factor appointed to receive the rents and profits; but after answers for the respondent, the Court on the 7th of July 1713, unanimously "refused a sequestration in this state of the process."

The respondent having also reclaimed against the said interlocutor of the 2d of July, and particularly against that part of it which found him liable for what had been disposed to George Home of Kaims; after answers thereto the Court on the 16th of July 1713, "found the respondent not accountable for the contents of the disposition made by Sir John Home to Sir Alexander, which were disposed by Sir Alexander with the respondent's consent to George Home of Kaims."

Entered,  
4 May,  
1714.

The appeal was brought from "two decrees or interlocutors of the Lords of Council and Session of the 7th and 16th days of July 1713."

*On the Sequestration.—Heads of the Appellant's Argument:*

The lease granted by the late Sir John Home, was absolutely a deed of trust for payment of debts, and to disburthen the entailed estate in favour of the appellant's father and his heirs; and the respondent having so grossly broken his trust, and so long avoided to come to an account, it was in law and equity just, that the rents should be sequestrated; for so long as the respondent continued to possess, it was his interest never to make a fair account.

The respondent cannot claim the benefit of the lease, as he has during the course of 43 years failed in the performance of every condition and clause to which he was bound, and indeed observed nothing save his entering to possess: and since in equity and by the law of Scotland, a tenant or lessee may be removed before the term of his lease expires, *si male versatus est in re conducta*, the appellant might well insist that the respondent should be removed, and that the appellant should have access to possess. All that the appellant, however, insisted for was, that after so long a time during which no account had been made, the estate might be sequestrated till it should appear in the event who had best right.

But the respondent having entered by the lease must possess by it, and must answer according to it, *nec potuit sibi mutare causam possessionis*. If he have other titles, being once removed, he may make use of them to recover possession, but he must first be judged

judged by the lease by which he entered. The pretended expired adjudications in his person are no titles to keep possession for they are led for debts which ought to have been paid by the trusts he undertook. As to the disposition of 1694, it is found to have been gained by fraud and circumvention, and therefore can be no title to continue to possess, and though it be not absolutely set aside, but so as still to remain as a security for a debt, it lies on the respondent to make out that debt, or valuable consideration before he can have the benefit of it; for the deed being obtained by fraud it presumes not, and proves not in law. If there be any valuable consideration or just title, the respondent's right will be entire, and in the event of the cause, he will have what belongs to him. It is most usual by the practice of Scotland to sequester estates, where there is a controversy concerning the titles, and more especially where there is manifest delay in coming to an account as there has been in this case for 40 years.

*Heads of the Respondent's Argument thereon.*

The appellant and his mother have all along been in possession of two thirds of the estate. The respondent being in possession by the lease which is to endure till all the debts be paid, he cannot be removed till it appear if the debts are or ought to have been paid, which cannot be done till the count and reckoning be closed. The respondent has also two other titles in his person sufficient to exclude the sequestration, namely, adjudications with expired legals, and secondly, the disposition granted by Sir Alexander Home, which by the judgment in the former appeal is not reduced wholly, but is ordered to stand as a security for any onerous cause or valuable consideration paid or made good by the respondent for the same. The respondent has given in his accounts signed by him, with the vouchers thereof conform to the late act of Sederunt, whereby, if the same shall be disproved, he will be subject to be decerned in double of what should be omitted out of the charge. By these accounts it appears, that not only the debts due to the respondent, and which he has paid, and the valuable consideration, which was allowed him by the said judgment, doth far exceed not only that part of the estate which the respondent possesses, but also the value of the whole estate: and no sequestration has ever been allowed in a similar case. The interlocutor appealed from, being the undoubted law of Scotland, the Court unanimously pronounced the same without a contrary vote; and the appellant did not offer to reclaim therefrom.

*On the Interlocutor 16th July 1713.—Heads of the Appellant's Argument.*

At pronouncing this interlocutor the Court were divided in opinion; but they had no power than to do otherwise than to appoint the respondent to account for the contents of the said disposition; for the judgment of the House of Lords does expressly order, that the

the respondent do account, not only " for the rents and profits of " the trust-estate granted to him by Sir John Home by lease 16th " May 1671, but for all other sums of money, debts, or move- " ables contained in the aforesaid discharge and disposition, which " belonged to the said Sir John Home, and were received by Sir " Patrick Home, and which ought to have been applied for the " debts charged on Sir John's estate." Now a considerable branch of the subjects in question is specially contained in the disposition reduced by the former judgment, viz. an appraising over the estate of Lammerton, which, though it had formerly been conveyed to George Home of Kaimes, is again therein expressly conveyed to the respondent. And the whole other subjects in the disposition in question were contained generally in the aforesaid discharge and disposition set aside by the judgment of the House of Lords; for the respondent was liable to apply the subjects in question to the payment of debts within one year after his father's decease in case his brother Sir Alexander did not. And the respondent did by fraud and circumvention obtain the forefaid discharge (now set aside), whereby he is not only acquitted of any account for the rents and profits of the trust-estate, granted to him by lease, but of his intromission with all debts, sums of money, goods, &c. intromitted with by him, which belonged to the deceased Sir John Home.

It was proved in the action below, that although the disposition was made by Sir Alexander, with consent of the respondent, to the said George Home, yet in fact the respondent had the possession, and accounted with the servants entrusted with the moveables, and otherwise applied considerable parts thereof to his own use.

*Respondent's Argument thereon.*

It would be against all reason to make the respondent liable to account for Sir John Home's personal estate, which had been actually disposed of by the appellant's father to George Home of Kaimes, for payment of some part of Sir John's debt; and the said George Home, as appeared by the evidence of several witnesses adduced by the appellant in the action of count and reckoning, had intermeddled with and disposed of the same; and particularly, it appeared that the said George Home having afterwards assigned the said personal estate to Henry Home his nephew, with a clause that he should be accountable to the appellant's father, he the said Henry Home, after his uncle's decease, by his bond dated the 21st of January 1681, obliged himself to account with and pay to the appellant's father what should appear to be due to him from the said George Home. Upon this bond the appellant's father afterwards brought an action, before the Court of Session, against the said Henry Home; and in a count and reckoning held thereupon, the appellant's father gave in a charge, containing a particular account of all the personal estate which had been disposed by his father to him, and by him assigned to the said George Home;



Home; and the said Henry Home gave in a discharge, mentioning the several debts that were due by Sir John to the said George Home, and which he had paid for him with the vouchers thereof, far exceeding in value the personal estate which the said George Home had intermeddled with. Several articles having been debated, and a time limited to the appellant's father for proving his charge, and he having failed therein, Henry Home, on the 6th of November 1684, obtained a decree whereby he was freed and discharged.

After hearing counsel, *It is ordered and adjudged that the said interlocutor of the 16th of July 1713, be reversed; and that the receipt of George Home of Kaimies, of the contents of the disposition made by Sir John Home to Sir Alexander, which were disposed of by Sir Alexander with the respondent's consent to the said George Home, be taken to be the receipt of the respondent; and that the respondent do therefore account for the contents of the disposition made by the said Sir John Home to the said Sir Alexander, which were disposed of by the said Sir Alexander, with the respondent's consent, to the said George Home: And it is further ordered, that the Lords of Session do appoint a receiver of the profits of the trust estate in question until such time as the accounts shall be taken, in pursuance of this order and the former order of this house of the 27th May 1712; and do likewise order that the tenants of the trust estate do pay the rents now in arrear, and the rents which shall grow due for the future, to such receiver; and that such arrears of rent and growing rents as shall be paid to such receiver be duly accounted for and placed forth at interest, with approbation of the Lords of Session, as soon as conveniently may be, for the benefit of such of the said parties as shall appear to be entitled thereunto upon the event of the said account.*

Judgment,  
17 July,  
1714.

For Appellant,  
For Respondent,

Rob. Raymond. Tho. Lutwyche.  
P. King. Sam. Mead.

Case 29. John Falconer Esq. and others, Creditors  
 of Thomas Craig, late of Riccarton, Esq.  
 deceased, - - - - - *Appellants ;*  
 John Musket and others, Creditors of Robert  
 Craig of Riccarton, - - - - - *Respondents.*

Fountain-  
 hall,  
 23 June  
 1712.  
 Forbes,  
 22 July,  
 1712.

3d July 1714.

*Tailzie.*—It being found that, in respect an entail, with prohibitory clauses, contained no irritancy of the right of the contravener, the debts of the heir in possession did equally affect the estate with the debts of his predecessors ; the judgment is reversed.

An entail executed prior to the act 1685 sustained, though objection made that it was not registered in terms of that act.

*Construſion.*—The Court of Session having found that the irritancy of the contravener's right in the entail of Riccarton did only respect the heirs female, and not the heirs male ; their judgment is reversed.

**T**HOMAS Craig late of Riccarton, deceased, executed an entail of his estate of Riccarton and other lands, which had been long enjoyed by his ancestors, in the following manner :—On the 14th of March 1684, he executed a procuratory for resigning the same to the crown, and afterwards procured a charter under the great seal, dated the 29th of January 1686, whereby the said estate and lands were granted (a) “ dilecto nro Thomæ  
*Destination.* “ Craig de Riccarton et hæredibus masculis ex ejus corpore ltime  
*Heirs male.* “ procrean. quibus deficient. Roberto Craig ejus fratri et hæredibus masculis ex ejusd. Roberti corpore ltime procrean. quibus deficient. Joanni Craig ejus fratri et hæredibus masculis de corpore dict. Joannis ltime procrean. quibus deficient. Jacobo Craig ejus fratri et hæredibus masculis ex ejus corpore ltime procrean. quibus deficient. Wmo Craig ejus fratri et hæredibus masculis ex ejus corpore ltime procrean. quibus deficient. filiz legitimæ natu maximæ dict. Thomæ Craig ex ejus corpore procrean. absque divisione, et hæredibus masculis ex corpore ejusd. filiz procrean. quibus deficient. dict. Thomæ Craig ejus alteri filiz sine divisione et hæredibus masculis ex ejusd. filiz corpore ltime procrean. et ita deinceps successive quam diu dict. Thomas Craig filias habuerit ; quibus oibus deficient. dict. Thomæ Craig ejus propinquioribus ltimis hæredibus et assignat. quibuscumque hærie et irredimabiliter cum et sub provisionibus restrictionibus limitationibus et conditionibus subtus expressis. Omnes et singulas terras baronias aliaque rexive possessiones. viz. totas et integras terras de Riccarton, &c. Cum et sub hac tamen provisione et conditione quod dict. Robertus Joannes Jacobus et Wmus Craigs fratres dict. Thomæ Craig et hæredes masculi ex eorum Corporibus procrean. nullam potesta-

*Conditions, provisions, &c.*

(a) On account of the singular importance of this case, and as the clauses of the charter are not recited verbatim either in the Appeal Cases or the Decisions where it is reported, a copy of the destination and clauses irritant and resolute was procured from the General Register House, which is here made use of.

" tem vel libertatem habebunt debita contrahere vel aliquod aliud  
 " facere in prejudicio hæredum feminarum ex corpore dict.  
 " Thomæ Craig procrean. penes eorum successionum ad terras et  
 " statum suprament. deficient. hæredibus masculis dict. Roberti  
 " Joannis Jacobi et Wmi Craigs ltime procrean. Quin etiam  
 " providetur et declaratur qd. oia talia debita et facta contract.  
 " vel fact. per illos nullius erint valoris roboris aut effectus ad  
 " afficiend. dict. Terras et statum aut dict. Thomæ Craig ejus  
 " filias et hæredes feminas quæ eisdem succedent liberæ et im-  
 " munes ab omni onere quocunque sine prejudicio tamen dict.  
 " Roberto Joanni Jacobo et Willielmo Craigs et eorum hæredibus  
 " masculis antedict. providen. suis sponis in vitali redditu ad  
 " quartam partem dict. terrarum et status duran. oibus eorum  
 " vitæ diebus et provisiones et portiones earum filiabus conceden.,  
 " si m-do dict. provisiones non excedent trium annorum reddit.  
 " dict. terrarum inter liberos uniuscujusque fratris. Providetur etiam  
 " et declaratur quod si dict. terræ et status quovis tempore futuro  
 " (deficien. hæredibus masculis dict. Thomæ Craig et ejus fra-  
 " trum ex corporibus suis procrean.) evenierint ad dict. hæredes  
 " feminas tunc et in eo casu hæres femina natu maxima de tem-  
 " pore in tempus tantum succedet sine divisione, et dict. hæres  
 " femina tenebitur et obligabitur nubere viro generoso cogno-  
 " mine de Craig vel viro generoso cujusvis alius cognominis qui  
 " et hæredes ex ejus corpore procrean. omni tempore postea  
 " dict. nomen de Craig assument et insignia seu arma domus de  
 " Riccarton gerent et utentur. Et sub hac etiam provisione quod  
 " minime fuerit in potestate dict. hæredum feminarum vel hære-  
 " dum ex earum corporibus procrean. dilapidare vel alienare dict.  
 " terras et statum nec debita contrahere vel aliquod aliud facere  
 " quo dict. terræ aut ulla pars earum ab illis evinci poterint, et  
 " si contravenire, vel in contrarium facere contigerint eo ipso  
 " perdent et amittent jus suum ad dict. terras et statum pro omni  
 " tempore inde sequen. et licitum et ltimum erit proximo hæredi  
 " Talliæ actionem declaratoriam desuper, prosequi et immediate  
 " postea intrare ad possessionem dict. terrarum et status absque  
 " onere nullius partis dict. debitorum aut factorum. Et similiter  
 " providetur et declaratur quod dict. debita et facta declarabuntur  
 " nullius fore valoris aut efficaciz sed vacua et irrita erint quoad  
 " afficiend. et onerand. dict. terras et statum vel proximum  
 " hæredem Talliæ et licitum et ltimum erit proximo hæredi  
 " Talliæ ad easdem succedere vel tanquam hæres contravenientis  
 " libero et immuni oneris dict. debitorum et factorum vel tanquam  
 " hæres illius qui obiit ultimo vestit. et fasit. immediate ante  
 " dict. contravenien. et eund. contravenien. præterire cum et  
 " sub quibusdam provisionibus et conditionibus antedict. Tallia  
 " et substitutio supra specificat. est facta, et concessa. per dict.  
 " Thomam Craig in favorem dict. personarum tantum et non  
 " aliter. Quæquidem Terræ de Riccarton, &c." Upon this  
 charter infestment was taken; but the entail was not recorded in  
 terms of the subsequent act of parliament 1685.

Thomas

Thomas Craig died without male issue, leaving one daughter surviving him, who was alive when this appeal was discussed. At the time of his death, he was indebted to the appellants in considerable sums of money; and these debts to the appellants had been contracted by the said Thomas Craig himself, or by his father or brother (to whom he was served heir) before the making of the said entail.

After the death of Thomas Craig, his brother Robert was served and retoured heir of entail and provision to him, and accordingly possessed the said lands as heir of entail. Sundry of the creditors of Thomas took new securities from this Robert Craig, who also contracted large debts of his own, and more than the said estate could have satisfied; and he thereby became and was declared a bankrupt. Adjudications of the said lands were also obtained by several creditors of Robert Craig, and of his brother Thomas, the entailer.

The respondents having afterwards brought an action of ranking and sale before the Court of Session, the appellants appeared for their interest, and pleaded that the creditors of Robert had no right to be paid out of the estate, since the deed of entail, under which Robert claimed, prohibited him from contracting any debts, and declared that any debts he did contract should be void: The respondents insisted, that as there was merely a prohibitory and no irritant and resolute clause, Robert still had the *dominium* and property of the estate, which must be liable to his debts. The Court, on the 25th of July 1711, "found that in respect the entail contained no irritancy of the right of the contravener, the debts of the said Robert Craig do equally affect the lands and estate of Riccarton, with the debts of his predecessors, according to their priority of diligence."—And to this interlocutor the Court adhered on the 13th of June 1712.

The appellants having further reclaimed, praying the Court either to find that there was no necessity for an express resolute clause, to make the prohibition upon the heirs male effectual, or to find that the resolute clause in the entail did affect the whole heirs therein mentioned. The Court on the 22d of July 1712, after answers for the respondents "adhered to their two former interlocutors; reserving to the parties to be heard before the Lord Ordinary in the cause, if the above-mentioned irritant and resolute clauses in the entail affect the whole heirs." Parties were accordingly heard, and a report being made to the Court, their Lordships on the 8th of July 1713, "found that the irritancy of the contravener's right in the said entail, doth only respect the heirs female, and not the heirs male."

The appeal was brought from "several interlocutors orders or decrees of the Lords of Council and Session of the 25th of July 1711, the 13th of June and 22d of July 1712, and 8th of July 1713."

Entered,  
12 April  
1714.

*Heads*

*Heads of the Appellants' Argument.*

By the clauses in the said deed of entail, it was not only provided, by the said Thomas Craig, that the said Robert and his brothers should have no power to contract debts, or do any other thing in prejudice of the heirs female of his body; but it was also declared that such debts *should be of no validity to affect his said estate*. And the said Robert being served heir of entail and provision to his brother Thomas in the very terms of the said settlement, his, the said Robert's debts could not affect the said estate, or come in competition with the debts due to the appellants, which had been all legally contracted by Thomas Craig the entailor and his predecessors, and to which he and the said estate were liable before the making of the said entail.

This entail being made before the act of parliament 1685, there was no necessity for registering it; and the provisos and conditions therein were sufficiently published and made known by the said Robert's service and retour as heir of provision to the said Thomas, wherein those provisos and conditions are expressly repeated, as well as in his investment following thereon. These being all matters of record, were sufficient to caution the appellants against the said Robert's contracting debts with them.

It is apparent, that it was the said Thomas's intention to prohibit Robert and his other brothers to contract debts, or do acts not only in prejudice of his heirs female, but of one another, *by the exception of a power to make jointures, and provide portions for younger children*. But it does not concern the appellants to dispute the import of the prohibition, whether it respected the other members of the entail, or only the heirs female; for either way it must operate in favour of the appellants, who were creditors before the entail; and it being expressly declared that Robert's debts shall be of no force or validity to affect the said estate, of consequence, in the ranking of creditors upon the estate these cannot come in competition with the appellants' debts which affected the same before the said entail.

It cannot be denied, that Thomas, the maker of this entail, had an unlimited property in his estate, and was under no obligation to call his brothers to the succession, much less to prefer them to his own daughters: but as such absolute proprietor he had an undoubted privilege of giving laws to his own, and might therefore dispose of his estate in such manner and under such provisos and conditions, for precluding the same from being affected with the debts of his successors, as he thought fit. And he has here disposed the same to the said Robert and his other brothers, under the said restrictions, whereby Robert after the death of his brother Thomas had only a limited property therein, so as that his debts should not affect the said estate. The debts owing to the appellants, therefore, which were contracted by the prohibitor himself, who was under no restriction, were preferable to the respondent's debts, which had been contracted by Robert contrary to the said prohibition.

An heir of entail is not bound to the payment or warrantice of all his predecessor's debts and deeds : for his predecessor being a limited proprietor, and the heir of entail only succeeding to him as such, he is only bound to pay and warrant such debts and deeds as do not evict and take away the limited fee.

The interlocutor of the 25th of July 1711, was founded upon a seeming inconsistency of a person's being proprietor, and yet not having the right of alienating or affecting the property, without irritating his own right and fee at the same time : but the appellants in a reclaiming petition, shewed from the common definition of *Dominium* or property, and several authorities, that there was no such inconsistency ; but that a property may be so limited that the proprietor cannot alienate, though at the same time the contravention may not import an irritancy of the fee. If there be no such inconsistency, the clause containing the limitation must be taken *cum effectu*, and thereby the appellants have an absolute right of preference.

The appellants in a reclaiming petition, after pronouncing the interlocutor of the 13th of June 1712, contended, that in the limitations of the said charter, there are contained three distinct periods. *In the first*, beginning at *cum et sub hac tamen provisione*, &c. there is a prohibition upon Robert, and the other brothers and the heirs male of their bodies to contract debts, except in favour of their wives and children, with an irritancy of the debts themselves, declaring, that the debts contracted by them shall neither affect the estate, nor the heir of entail. *In the second*, beginning at, *Providetur etiam et Declaratur quod si dict. terre*, &c. there is a prohibition upon the heirs female to contract any debt whatsoever, and an injunction to marry one of the name of Craig, or who shall assume that name, and bear the arms of the house of Riccarton, with a resoluteive clause, whereby it is provided, that immediately upon the contravention they shall lose their right, and that it shall be lawful for the next heir of entail to pursue a declarator, and enter into the possession of the estate, without any burden of their debts. And then there is a *third period*, beginning at *Et similiter providetur et declaratur*, &c. wherein there is a proviso relating to both the foregoing periods, and the heirs of entail therein mentioned, that not only all the debts and deeds done by the said heirs of entail, should be of no force or effect to charge the estate, but that it should be lawful for the next heir of entail, either to succeed to the contravener, free of such debts and deeds, or to pass him by, and succeed to his predecessor. And all is concluded with these general words, "*Cum et sub quibusdam provisionibus et conditionibus antedict. Tallia et substitutio supra specificat. est facta. et concessa. per dict. Thomam Craig in favorem dict. personarum tantum et non aliter.*" It is obvious, that in this last period, there is both an expressed irritant, and resoluteive clause, which is not only applicable, but must necessarily refer to both the antecedent periods, and by consequence to the whole heirs of entail therein mentioned. If such an interpretation can be made, it ought to be admitted in this case, as most agreeable

to the mind and intention of the maker of the entail; which evidently appears to have been to secure his estate, against being wasted or alienated by any of his heirs of entail, that it might descend to all the substitutes therein free and unincumbered in all the channels through which it was to pass. To what purpose otherwise, was there so anxious a prohibition on his brothers to contract debts? and to what purpose was a liberty granted them to contract debts in one particular case? viz. for making provision for their wives and children, if his mind and intention had not been to bind them up in other cases. The Court by their interlocutor having found, that, in respect the entail contained no irritancy of the right of the contravener, therefore his debts do affect the estate, have in a manner found that without a resolute clause, a simple prohibition is ineffectual. But there being now a general resolute clause fixed on, subjoined to all the prohibitions, both upon the second and third classes of the heirs of entail, this clause must necessarily be so interpreted as to refer to the whole, *ut actus valeat*; and this the more plainly appears, if the tenor of that clause be considered with the others. The brothers, therefore, were not only under a simple prohibition, but under a prohibition with a resolute clause.

#### *Heads of the Respondents' Argument.*

All deeds of entail are inconsistent with the genuine notion of property, and plainly tend to a perpetuity: upon that account they are to be interpreted most strictly, and not to be extended from one case to another. But in this case there is no manner of restriction upon Robert and the other heirs which can be of any use to the appellants: for the restriction upon the heirs male is expressly that *they should not contract any debts in prejudice of the grantor's heirs female, and in case they did, the debts should be void*. But the grantor's heir female is no party to this action, nor does she complain; and consequently it is *jus tertij* to the appellants whether the heir female be prejudiced or not, and they cannot plead that the debts are void as to them, for it would be of the worst consequence, if, because there were a prohibitory or other clause in a deed of entail in favour of a particular heir, that therefore other heirs of entail (whom the grantor seemed to exclude by not including them) or their creditors should be allowed to found upon this privilege merely personal in favour of the particular heir.

Though that prohibition to contract debts did extend to the appellants as well as the grantor's heirs female, yet it can be of no use to them, since there is no clause irritant or resolute of the heirs right upon contracting of debts: for it is the concurring opinion of all Scots lawyers, that these words are but a simple prohibition, and of no effect unless the ordinary irritant clause be likewise added, viz. that in case the heirs should contract debts, these debts should not only be void, but the contractor should *eo ipso* forfeit his right to the estate, and the next in remainder enter and hold the estate free of all the debts. It is not enough to void

the debts, but likewise the estate; and unless the estate is voided in that manner, it is impossible to prevent the debts from binding the estate, because the person succeeding must serve himself heir to the last possessor; and if he does, he thereby subjects himself and the estate to those debts. It was to prevent this that irritant clauses were first invented, and added to the deeds of entail, by those who intended to perpetuate their estates and families; and without the irritant clauses, the possessor continues truly proprietor, may burthen his estate with debts, or sell the lands for payment of debts. Indeed the act of parliament 1685, which is the foundation of all these deeds of entail mentions only these irritant and resolute clauses, as of force to tie up the proprietors from alienation or contracting debts. The grantor himself, too, seems to have been of this opinion, for, where the estate is limited to the heirs female, the debts are not only declared void, but the fee or estate is voided, and the next in remainder has a power to enter. If the grantor, then, had intended to have voided the fee of the heirs male, as well as of the heirs female, it had been easy to have expressed it in both, but his doing it in one, and omitting it in the other, plainly shews his intention.

There is nothing more evident, than that in this deed, there are two branches of substitution; first the grantor's brothers and the heirs male of their bodies, next the issue female, to both of which there are distinct clauses subjoined; to the first, only a simple prohibitory clause, of not contracting debts; but to the last not only a prohibitory clause, but irritant and resolute clauses voiding the fee, from a just and reasonable view, that by marrying they would be under the influence of their husbands, who being of other families, had not the same natural ties upon them to preserve the family, as the heirs male were presumed to have. And as this is an ordinary practice in Scotland so upon view of the clause itself, it is impossible so far to strain the words as to extend the irritant and resolute clause to the heirs male.

Upon the whole, to reverse this decree would be a matter of the most dangerous consequence, since the said Robert Craig, according to the undoubted principles of the law of Scotland, was proprietor of the said estate, and could subject it to his debts. Upon the faith of this the respondents *bona fide* lent him money, and several of the creditors of Thomas Craig cancelled their former obligations and took new ones from Robert; and the appellants were so much persuaded of Robert's right to the said estate, that they brought actions against him for their debts, and obtained adjudications, which was not a regular way if the fee had been voided. The appellants have adjudications of the same date with the respondents, and both will be equally paid, notwithstanding of what the petition and appeal untruly suggests.

Judgment,  
2 July 1714.

After hearing counsel, it is ordered and adjudged, that the said interlocutory order or decree of the 25th of July 1711, whereby the Lords of Session in respect the entail contained no irritancy of the right of the contravener, found, " that the debts of the said Robert Craig  
" do



"do equally affect the lands and estate of Riccarton, with the debts of his predecessors, according to their priority of diligence," and the two several interlocutory orders or decrees of the 13th of June and 22d of July 1712, whereby the Lords of Session adhered to their former interlocutor, be reversed; and that the said interlocutory order and decree of the 8th of July 1713, whereby the Lords of Session found "that the irritancy of the contravener's right in the said entail, doth only respect the heirs female, and not the heirs male," be also reversed,

For Appellants, Rob. Raymond. Sam. Mead.  
For Respondents, Tho. Lutwyche. P. King.

The judgment of the House of Peers in this case, is of the highest importance, as it reverses the doctrine laid down by the law writers, on the authority of this case at least, viz. That entails being of most strict interpretation, a mere prohibition to contract debt, if there be not also an irritant and resolute clause, does not hinder the heir of entail from subjecting the estate to his debts. In support of this doctrine, the decree of the Court of Session, which is here specially reversed, is founded on in the Dictionary of Decisions, vol. ii. voce Tailzie, p. 432. Bankton, b. 2. tit. 3. sect. 139. Erskine, book 3 tit. 8. § 29. Though the decree of the Court of Session was in this case reversed, also upon another point, (the construction), it appears from the words of the Judgment, that the doctrine upon the first point, (the prohibitory clause without an irritant or resolute one,) was also particularly under consideration.

It is also remarkable on another point, as supporting an entail, made prior to the act 1685. c. 22. but not registered in terms of that act. The decisions upon this point have been fluctuating, but it appears that since this judgment, the House of Peers in the case, *The Earl and Countess of Rothes v. Philp*, 16th January 1761, "declared that entails created of Lands in Scotland, with prohibitive irritant and resolute clauses, before the making of the act of Parliament 1685, ought to be recorded in the register of Tailzies, according to the said statute."

Case 30. The Gubernators of Heriot's Hospital, and  
 Dalrymple, James Young their Treasurer, - - Appellants;  
 9 June 1714. Robert Hepburn of Bearford, - - Respondent.

2d, June 1715.

*Kirk Patrimony.*—The superiority of certain church lands, which were purchased from the crown for an onerous consideration, and which were specially excepted in the act 1633, c. 13. "anent regalities of erection," part of the general re-annexing acts, found to be in such purchasers, where the vassal had taken charters and infeftments from the subject superior for near 100 years.

THE lands of the popish clergy soon after the reformation in Scotland fell to the crown, and his then Majesty King James the 6th granted great part of these church-lands to certain noblemen and gentlemen, and erected them into temporal lordships. Sir William Ballindine had a grant from his majesty of the estate, which had belonged to the abbey of Holy-Rood-House, which comprehended the barony and regality of Broughton and Canon-gate. By the act of parliament 1587, c. 29. the temporalities of all benefices and church lands were re-annexed to the crown; but with an exception in the following words, "Our Sovereign Lord and the estates have declared, and by the tenor hereof declare, decern, and ordain that the lands, lordships, baronies under-written, &c. are not nor shall not be comprehended in the said annexation, excluding the same allutterly therefrae, to remain with the persons to whom they were first disposed after the form and tenor of the infeftments made to them thereof." Then follows an enumeration of the exceptions, among which is the barony of Broughton.

In 1627, Sir William Ballindine, among other lords of erection, signed the submission to Charles the First, upon which his majesty's decret arbitral afterwards proceeded. In the same year 1627, Sir William, for an onerous consideration sold and conveyed the said lands to Robert Earl of Roxburgh: And in 1630, the Earl, with consent of Sir William Ballendine, sold and conveyed the same to King Charles the First, for the price of 280,000 merks Scots. This sum, however, not being paid, the King granted to the Earl a wadset over the lands in security of the said sum, under the great seal, on which the Earl was infeft.

1633, c. 10.  
 & 14.

In 1633, several acts of parliament were passed in consequence of the King's decret arbitral. By c. 10, & 14. the superiorities of all church lands are annexed and declared to remain with the crown for ever, and all rights and settlements whatsoever made and granted to any person or persons by his then majesty or his predecessors, preceding the date of the said acts, are declared void and null. In c. 13. of these acts, which is entitled "*Anent Regalities of Erections*," it is "declared, decerned, and ordained, that the lands and barony of Broughton," and others "mentioned  
 " in

c. 13.

“ in the infeftment granted by his majesty under his highness's great seal, to his highness's right trusty cousin and counsellor Robert Earl of Roxburgh, of the date the       day of 1630 years, shall not be comprehended herein, excluding the same allutterly therefrom, to remain with the said Earl, his heirs and successors, after the form and tenor of the infeftments made to him and his authors of the same.”

In 1637, a transaction took place between his then majesty and the appellants; and the king, by a deed, bearing to be with consent of his exchequer, and of Robert Earl of Roxburgh, sold and in the most ample manner disposed to the appellants, the said barony and regality of Broughton and Canongate, and *in verbo principis*, promised to obtain an act of parliament dissolving these lands from the crown, and declaring that it was the meaning of the king and parliament, that the exception in favour of the Earl of Roxburgh, contained in the said 13th act was ordained and intended to have been a quality of the said 14th act also: and in consideration thereof, the appellants paid off the Earl of Roxburgh's wadset, amounting to 11,000*l.* sterling, and further paid the sum of 3000*l.* sterling to the crown. In 1641, a *private* act of parliament was passed declaring “ That the lands and barony of Broughton shall be by no means esteemed to be comprehended within the 14th act of the first parliament of King Charles the First; but the words, excepting the regality and and barony of Broughton, shall be esteemed as inserted in that 14th act in the year 1633 above mentioned.”

In 1661, an act of parliament was passed, rescinding all acts passed in the parliament 1641, but it contained a proviso or declaration in these words, “ And it is hereby declared, that all acts, rights, and securities passed in any of the pretended meetings above written, or by virtue thereof, in favours of any particular persons for their civil and private interests shall stand good and valid unto them until the same be taken into further consideration, and determined in this or the next session of this parliament.” 1661, c. 18.

Another act of parliament was passed same year, ratifying the annexation acts of 1633, by which all and whatsoever grants, rights, or infeftments of the said superiorities made or granted by his then majesty, or his father King Charles the First, at any time since the submission in 1627 are rescinded and declared void and null, with the exception of one infeftment in favours of John Earl, afterwards Duke of Lauderdale. And this act besides, holds all exceptions contained in the acts of 1633, as contained in that act, and contains a proviso or declaration, by which it is always declared, that “ notwithstanding of this act, any who have gotten or shall get any new infeftment of superiority of Kirk lands, the same shall stand good as to such vassals, who have given their consents to the said right of superiority; in regard that such a consent as to his majesty is of the nature of a resignation of their property in favours of the said superior.” 1661, c. 53.

The respondent was proprietor of the lands of Lochbank, part of the said barony of Broughton, which had been acquired by

the appellants in manner before-mentioned. These lands had been held by the respondents predecessors, without challenge, from the appellants as superiors thereof, and the latter had granted sundry charters and precepts of Clare Constat to the former as their vassals, from 1641 downwards. But the respondent claiming to hold his lands of the crown, the appellants brought an action of declarator of non-entry against him before the Court of Session; and the respondent brought a counter action of declarator against them, concluding that his privilege might be declared to hold *in capite* of the crown. Both causes being heard before the Court of Session, an interlocutor was pronounced on the 13th of February 1714, by which it was "declared that the respondent " was acquitted from all claims of superiority for his lands of " Lochbank at the appellants' instance; and that the respondent, " his heirs and successors, had the undoubted right and privilege " to enter vassals, and hold the fee of those lands of his majesty " and royal successors the immediate lawful superiors thereof." The appellants having reclaimed against this interlocutor, the Court, on the 9th of June 1714, " adhered to their former in- " terlocutor, and found that the arguments and acts of parlia- " ment made use of and produced by the appellants did not ex- " ceem the superiority of the lands in question from the annexa- " tion made by the 10th and 14th acts of the parliament 1633, " and therefore decerned in favour of the respondent."

Entered  
22 June  
1714.

The appeal was brought from "an interlocutor or sentence of the " Lords of Council and Session, dated the 13th day of February " 1713-14, and the affirmance thereof on the 9th of June 1714."

#### *Heads of the Appellants' Argument.*

By the act 1633, c. 14. the superiorities of such church lands only were annexed to the crown, the original grants of which stood merely upon charters from the crown. But the barony of Broughton, which comprehends the subject of the present debate, was not in that situation; for though it had been originally granted by a charter from the crown, yet that grant was not only excepted from the general act of resumption and annexation passed in 1587, but the said grant was confirmed and appointed to remain with the grantees according to the said charter and infeftments. Thus the right stood and stands on the foot of a public law not repealed expressly, nor by any necessary consequence. 2dly. The king having for an onerous or valuable consideration purchased this barony, and not having paid the price, *simul et semel*, wadset it for the price; and it cannot be imagined, that the king and parliament meant by the general words of the said act 1633. c. 14. to deprive the Earl of Roxburgh, under whom the appellants claim, of his wadset. 3dly. This is the more evident, because in the 13th act, passed the same day in the said parliament 1633, the above reservation is expressed in the most ample manner, not with regard to the jurisdiction of regality only, but also with regard to the lands and barony of Broughton, comprehending the mills and others thereto belonging. It were indeed to suppose, a thing

thing against all equity and reason, that the very next subsequent chapter of these acts should be deemed to take away the benefit of this exception without an express rescinding clause or reason assigned; and indeed whoever is acquainted with the history of these acts of parliament, containing resumption of the temporality of jurisdictions and offices of church lands knows that these were not properly distinct acts, but several heads of one great settlement, the printing and forming of which were of course left to the clerk register, who has made the 14th act the last, though by the very tenor of the 13th act it appears, that it was the last in order, and the exception was inserted in that place as an exception from the whole annexation: It, therefore, excepts not specially the jurisdiction of regality which is the subject of the act, but the barony and lands, which were no part of the subject of it regularly. 4thly. As this must be good to defend the wadset for the said sum of 11,000*l.* sterling, so it ought to defend the reversion which was fairly purchased for the additional price of 14,000*l.* whereof the 11,000*l.* was paid to the Earl of Roxburgh, and the remaining 3,000*l.* to the crown, for which the hospital have not of yearly income above 200*l.* To satisfy the nicest scruple, too, it was covenanted on the part of the crown to procure an act of parliament, declaring that it was the meaning of the king and parliament, that the exception in favour of the Earl of Roxburgh, contained in the said 13th act, was ordained and intended to have been a quality of the said 14th act also. And accordingly there was an act of parliament passed in 1641, in these terms, and that not in the terms of a common ratification, but as a private act, confirming the king's deed done with advice of his council in that matter for a very valuable consideration paid and performed by the hospital.

This last mentioned act 1641 is not repealed by the rescinding act 1661, c. 15.; for this rescinding act contains an exception of all *private* acts passed in that parliament, of which nature is the act in favour of the appellants. The respondent objected, that this last exception was not absolute, but temporary, till those private acts should be taken into further consideration in that or the next session of parliament; but that the case of all the church lands was taken into consideration in these sessions: there never was, however, any act of parliament subsequent to the last above-mentioned rescinding act, which in any manner of way had under consideration any of the church lands, so that the 15th act of the parliament 1661 still stands good and valid.

It is to be remembered, too, that the king was in possession of those lands in fee, upon passing the above-mentioned act 1633. But if the respondent had any right or title, as he pretends, to the superiority of the above-mentioned lands, he would be debarred by the act of parliament 1617, c. 12., "Anent Prescription of Heritable Rights," by which it is enacted, "that whosoever his majesty's lieges, their predecessors and authors, have bruiked or enjoyed heretofore or shall happen to brook in time  
" coming

1617, c. 12.

“ coming by themselves, their tenants, and others having their  
 “ rights, their lands, baronies, annual-rents, and other heritages,  
 “ by virtue of their heritable infeftments made to them by his  
 “ majesty, or others their superiors and authors, for the space of  
 “ 40 years, &c. that such persons, their heirs, and successors,  
 “ shall never be troubled, pursued, or inquieted in the heritable  
 “ right and property of their saids lands and heritages foresaid by  
 “ his majesty, or others their superiors and authors, their heirs  
 “ and successors, nor by any other person pretending right to the  
 “ same by virtue of prior infeftments, public or private, nor upon  
 “ no other ground, reason, or argument, competent of law, ex-  
 “ cept for falsehood.”

Besides the respondent and his predecessors, in virtue of the  
 the clause of the before-mentioned act 1661, c. 53. are debarred  
 from holding of the crown, for his predecessors have for almost  
 100 years “ given consent to the said right of superiority,” and  
 taken their charters from the hospital accordingly.

#### *Heads of the Respondent's Argument.*

The acts or statutes of annexation are general, and compre-  
 hend all superiorities of church lands whatsoever, and make no  
 distinction whether the grant had been for an onerous considera-  
 tion or not, and whether before or after the annexation. Parti-  
 cularly the before-recited act 1661, c. 53. does rescind all grants  
 made by King Charles the First, except that in favour of the Duke  
 of Lauderdale, which confirms the rule and law as to all other  
 grants not excepted. Though the grant made to the Earl of  
 Roxburgh, and by him to the appellants, might have been for  
 onerous considerations; yet the first grant was in favour of Bal-  
 lindine of Broughton, and it does not appear that his grant was  
 for any onerous consideration, and he is one of those who sub-  
 scribed the submission to the king in 1627, upon which the acts  
 of annexation followed.

With regard to the act 1633, c. 13. relied on by the appellants,  
 there is a great distinction between a regality and a superiority.  
 Several of the church lands having been erected into regalities in  
 favour of the bishops and abbots, whereby they had a power over  
 their tenants and vassals in civil and criminal matters; these were  
 also annexed to the crown, with the exception in favour of the  
 Earl of Roxburgh, so that the vassals of that regality remained  
 subject to the earl's jurisdiction or power. But this is different  
 from the superiority; a convincing proof of which is, that the  
 very next act, c. 14. annexes the *superiority* of all church lands to  
 the crown, without any exception in favour of the Earl of Rox-  
 burgh: and the act 1667, c. 53. rescinds all grants made by King  
 Charles the First, except that in favour of the Duke of Lauder-  
 dale. But what fully answers the appellants' argument on this  
 head is, that when the Earl of Roxburgh in 1637 sold the lands  
 of Broughton, with consent of the king, to the appellants, his  
 majesty promises in the next parliament to procure these lands  
 dissolved

dissolved from the crown, so that if they had not been annexed, there was no occasion for such an act.

But this was never done, nothing was obtained in the parliament 1641, but a simple ratification passing in course on the last day of the parliament, among 300 more, of which this is the 135th: they were never printed among the other acts of parliament, but passed of course, and might be obtained by any person who demanded them; and they can never prejudice the interest of a third person having a prior right, which is the case of the respondent. His right is preserved by the act *Salvo jure cujuslibet*, which is always the last act of every parliament. But dissolutions of superiorities that had been annexed to the crown must be by such public acts of parliament as pass with all the deliberation and solemnities of the acts of annexation, and have the royal assent, which is not pretended to have been the case with the act 1641.

With regard to that part of the act 1661, c. 53, founded on by the appellants, There being a publick law annexing these superiorities to the Crown, no deed of the vassals could without consent of the Crown deprive it of that superiority, but according to the tenor of the exception contained in this last-mentioned act, which is an express consent by some writing from the vassal. This is clear by the words of the statute, viz. "In regard such a consent, as to his majesty, is of the nature of a resignation," or giving over the lands to the superior to be holden of the king. So, this consent was to be by such an express and positive deed in writing, as was equivalent to the vassals surrendering to the king; and the same vassal continuing only to take charters, or new titles, from those who had been lords of erection, was but a temporary expedient, and a consent by implication, and not equivalent to a resignation in the Crown's hands required by the statute.

Nor can the act 1617, c. 12, with regard to prescription take place here, for the appellants' contract in 1637 was entirely cut off as to the right of superiority, by the act 1661, c. 53, and so was no title of prescription unless it had been renewed after the said act. The possession for forty years, by the law of Scotland, gives no right, where the person claiming it has no title, and when the defender has it in his choice to act and do this or that way, (which by the doctors of the civil law is called *actus mere facultatis*,) except he had given a positive writing binding him to it. This is confirmed by all the eminent Scots Lawyers who write on this subject, and is the constant practice of the Lords of Session in the like cases. Nor is it to be doubted but that the crown in this case can oblige the respondent to take his charters or titles, immediately from it as vassal to the crown, because no deed done by the vassal can prejudice the sovereign without his own consent.

After hearing counsel, *It is ordered and adjudged that the said Judgment, interlocutor or sentence, and the affirmance thereof complained of in the said appeal, be reversed; and it is ordered and declared, that the*

Judgment,  
2 June 1715.

*super-*

*superiority of the lands in question, called Lochbank, lying within the barony of Broughton, shall belong to the appellants.*

For Appellants, *David Dalrymple.* Sam. Mead.  
For Respondent, *Edward Northey.* Spencer Cowper.

The judgment here reversed is founded on in the Dictionary voce *Kirk Patrimony*, vol. 1. p. 531.

Case 31. The Corporation of Butchers in Edinburgh, *Appellants*;  
The Magistrates of Edinburgh, and Corpora-  
tion of Candlemakers there, - - Respondents.

29th June 1715.

*Burgh Royal.*—The Court of Session having found that the butchers of Edinburgh should be restrained from rinding tallow for sale, and that the magistrates could oblige them to sell their tallow at a certain price to the candle-makers, which was in terms of a bye-law of the magistrates, ratified by a private act of parliament, the judgment is reversed.

*Act of parliament:* 1540, c. 123.—This act was not sufficient to restrain the butcher: from melting or rinding their tallow.

1424, c. 32. BY an act of parliament 1424, c. 32. it is enacted, “that na  
1540, c. 123. “cheitte be had out of the realme, under the paine of es-  
cheitte of it to the king.” By another act of parliament 1540  
c. 123. it is enacted, “that na maner of man, fleschour nor  
“others, to burgh nor to land, take upon hand to rinde, melt,  
“nor barrel tallun, under the paine of tinsel of all their gudes.”

The magistrates of Edinburgh, by a regulation or bye-law, dated the 15th of September 1517, discharged all the inhabitants of the burgh, other than the candle-makers from melting tallow or making candles, except for their own use and so burn in their own families. By another regulation or bye-law, dated the 10th of October 1551, the magistrates ordained, that no butcher or other person within the said burgh, should sell any tallow to strangers or inhabitants of other towns, but to the neighbours and candle-makers thereof; and that no freeman, other than the candle-makers, by themselves or servants, should melt any tallow for making of candles, beyond what they made for their own use, under the pain of escheat thereof, payment of 5*l.* to the common works, and *banishing the town.* King James the 6th, on the 4th of May 1597, by a ratification of privy council, and a grant under the great seal, not only ratified the said acts and ordinances of the magistrates, but all such further rules and constitutions as should be thereafter made in favour of the candle-makers.

By another regulation or bye-law, dated the 27th of September 1693, the magistrates ordained, “that the price of rough tallow  
“should not exceed 48 shillings Scots per stone, and that the  
“price of candles should be 58 shillings Scots per stone; and  
“that



" that the butchers of Edinburgh, and others, should sell all their tallow to the candle-makers, and to no one else till they were served, on pain of forfeiting their goods, and such further penalties as the said magistrates should think fit to inflict : And that for the future, all the country butchers bringing meat to Edinburgh on the market days, should be obliged to bring in their rough tallow to be sold on the said market days to the said candle-makers and burghesses, and to no others till they were served, under the said penalties." The magistrates also revived a former bye-law, bearing date the 17th of October 1684, imposing a fine of 20 shillings upon the transgressors. And all these regulations and bye-laws, with the ratification under the great seal before-mentioned, were ratified and confirmed by a private act of parliament on the 17th of July 1695 ; but this (the appellants state) the magistrates and candle-makers did not, till very lately, put in execution.

The appellants, however, refusing to sell their tallow to the respondents the candle-makers, at the rates mentioned in the fore-said bye-law, the magistrates, in June 1714, ordained a fine of 20 shillings sterling, to be levied upon all persons refusing to obey the same. The appellants, thereupon, commenced an action of reduction and declarator before the Court of Session, against the respondents, concluding, that the acts and regulations before-mentioned, and all other acts, bye-laws, and ordinances whereby any restraint was laid upon them as to the price and manner of disposing of their tallow should be reduced and made void ; and that it might be found and declared, that they had right to sell their tallow rough or rinded to any persons whatsoever, without distinction ; and to rind and export the same to England, or elsewhere as they should think fit. The respondents brought a counter action of declarator against the appellants, to have it decreed and declared, that the appellants had no right, and ought to be discharged to melt down any tallow, or sell the same to any other person, till such time as the respondents and other free burghesses and inhabitants of the burgh should be served ; and that the appellants ought to sell their tallow at the rates and prices set thereupon by the magistrates, according to the laws and ordinances made by them. Both these actions being heard, the court, on the 15th of February 1715, " found that the appellants ought to be restrained from rinding of tallow for sale, and also found that the magistrates and council of Edinburgh could oblige the appellants to sell their tallow to the candle-makers, at a price to be put thereupon by the magistrates and town-council."

The appeal was brought from " an interlocutor, sentence, or decree of the Lords of Council and Session, made the 15th of February 1715."

Entered,  
11 May,  
1715.

#### *Heads of the Argument of the Appellants.*

The old laws with respect to the restraint of exposing the native produce of the kingdom are much altered by the increase of trade, having since learned by experience that any small inconvenience

science particular persons might suffer by paying a little more for the home product, is much more than compensated by the advantage which the nation in general, and the crown, reap by the exportation of such commodities into foreign parts. Although by several old laws fish was prohibited to be exported, yet in after times fish was not only allowed to be exported, but a premium given for the export thereof both before and since the union. And this is the very case, as to the old laws prohibiting the exportation of tallow, which by degrees became obsolete and in disuse, tallow being now a *staple commodity*, and since the union expressly allowed to be exported. The act against the melting, rinding, and barrelling of tallow, was only to prevent the exportation; and when that act was in force it extended generally to all men, butchers and others, and so comprehended even the candle-makers themselves, and all persons making candles for their own use; which plainly infers, that it must be meant only of melting, &c. in order to export it, and so falls in consequence with the prohibition of exporting it.

The several acts, ordinances, or bye-laws of the magistrates and town-council, and particularly that in 1693, whereby any restraint was laid upon the appellants as to the price and manner of their disposing of their tallow, ought to be rescinded and declared void and null in themselves, for the several reasons following, viz.

1. For that the laying such a restraint was against the common right of the subject, both buyer and seller, destructive to trade, and an unwarrantable and unprecedented imposition, not only upon the appellants, but upon other free subjects who must be furnished in publick markets, and cannot otherwise have an opportunity of buying tallow for their respective uses: And if this bye-law should be binding, it would be a precedent to the magistrates of other burghs to make the like regulations, which would be a manifest grievance to all such subjects as are not free of those burghs.

2. For that the giving the candle-makers such a right of pre-emption, tended manifestly to a monopoly, and gave them power to impose upon their fellow subjects such rates for their tallow as they thought fit.

3. For that the said act or bye-law of the magistrates in 1693, was not only contradictory to their former bye-law in 1551, which allows the sale of tallow to all the *neighbours* of the burgh, without any restriction to burgeses only, but is wholly partial in favour of the respondents, the candle-makers and themselves, by excluding their neighbours of the former benefit of buying tallow for their own use within the said burgh, as before they might.

4. For that the said bye-law is incoherent and impracticable in itself; for how can the appellants know when the candle-makers and other burgeses are all served; or how is it possible to distinguish between a burges, and an inhabitant that is not a burges.

5. For

5. For that such an ordinance or bye-law is manifestly inconsistent even with the British acts since the union, which allow all subjects in general to make candles for their own use, paying the duty imposed thereon. And if this bye-law should take place, this privilege of making their own candles would, in many respects, be rendered ineffectual to all such persons as are not burghesses, or at least they would be under such inequalities and inconveniences as the law has no where laid upon them.

6. For that these bye-laws are unequal and unjust, since there is no obligation laid upon the respondents, to take all the appellants' tallow off their hands at the rate therein prescribed, whereby the appellants (if this bye-law shall be allowed valid) will be put under this insuperable disadvantage, that when they have kept their tallow till the candle-makers and burghesses are served, it is still optional to them to buy or not, as they think fit. And indeed, if they can have their tallow from the country, as it is well known they may, they will not, and need not, buy it from the appellants, but the appellants' tallow must be upon their hands till it be useless, if they cannot export it as other subjects do, or otherwise they will be obliged to sell it at such a price as the respondents will please to give for the same; and more especially if they should be restrained from rinding it, without which it will putrify, and be of no use in less than two days.

For that the magistrates, as they have not a power to restrain the appellants from selling their tallow to any person that wanted the same, so they have no authority to set a price thereon by any bye-law. For although the magistrates may set prices upon victuals, as bread, ale, &c. with which the inhabitants must necessarily be furnished within the burgh, yet they have no power to set prices upon any original commodity, as tallow, no more than upon wheat, barley, hides, wool, &c. and the acts of parliament, whereon they found their pretended authority, relate only to victuals, or such other things as are therein expressly named: and the giving such a power to magistrates of burghs, to set prices upon tallow, hides, and other original commodities, would prejudice the gentlemen of landed property, since it might in a great measure tend to lessen the value of their estates.

As to the act of parliament in 1695, whereby the bye-law of 1693 was ratified, such acts of ratification are passed of course, (as this was without calling the appellants) and by the laws of Scotland have never been reckoned of any importance, for, if the ordinances or bye-laws which are so ratified be void in themselves, the ratification will give no sanction thereunto; and the custom of Scotland provides against such ratifications, where parties are neither heard nor called by an act designedly made at the end of every session of parliament, the *act Salvo jure Cujuslibet*. The last part of this very bye-law, whereby the country butchers who brought meat on the market days, were enjoined to bring in their rough tallow to be sold on the said market-days to the candle-makers and burghesses, was in 1698, notwithstanding such ratification, rescinded by the privy council, and declared to be an abuse; and

and the appellants have reason to believe that if they had complained at that time, the said bye-law, as to them, would have met the same fate.

The respondents objected, that they were bound by their oaths to obey the ordinances of the magistrates, but the appellants are not bound by their oaths to observe any ordinances which are illegal and unjust in themselves. The respondents objected likewise, that the appellants would raise the price of candles in case these ordinances were not observed by them; but this was started only to incline the members of the College of Justice to favour the respondents. For although the appellants should demand exorbitant prices, the candle-makers would be under no necessity of buying from them, but could, and no doubt would, furnish themselves from other places, as every person knows they might: *And thus, it would be in the power of the candle-makers to ruin the butchers at pleisure.*

*Heads of the Respondents' Argument.*

The statute 1540, c. 123. whereby the appellants are expressly forbid to melt tallow, is not in defuetude, and there have been continued prohibitions with regard to the appellants' selling tallow till the respondents and other burgeses be first served, neither are these prohibitions inconsistent with the privileges of the staple, because the appellants were to furnish the respondents with their tallow for the use of the inhabitants, and the surplusage might be exported. Nor does the treaty of Union unhinge the privileges of burghs, or make void their regulations upon their lesser incorporations, which are for the good and service of the inhabitants and other lieges; and the general freedom of trading agreed to by the Union was never meant to lay open, destroy, or overturn the laws, ordinances, or constitutions of the burghs.

All burghs by their charters of constitution have power of making by-laws or ordinances amongst the lesser corporations, as may be for the benefit and advantage of the whole, by regulating the subject of trade belonging to each corporation, viewing the markets and ordering the prices of *vivers*: and the observing and exercising that power is recommended to the magistrates of every burgh by several statutes ordaining them to set reasonable prices upon wine, salt, timber, &c. In pursuance of these laws the magistrates of Edinburgh have been in the constant practice of regulating the prices of such things within the city as they judged necessary for the common good, and particularly that of tallow, which has been ratified and confirmed by King James the Sixth in 1597, and by King William in 1695. Neither is the trading in tallow properly the appellants' employment; the respondents, the candle-makers, being a corporation specially constituted for that effect; and as the subject of their trade within burgh comes from the hands of the appellants, it is most just and reasonable, that that subject should be regulated by the magistrates, lest it should be in the power of one incorporation entirely to disappoint the trade of another, to the great prejudice of the lieges: and

1540, c. 100.

1551, c. 23.

1755, c. 57.

the magistrates have always been so careful of the appellants, that they annually rate the tallow higher or lower according to the prices of cattle, of which they are fully apprised before they make any ordinance concerning the same.

That which has been the practice of the appellants for near 200 years, as appears by the ordinances of the city council, is still practicable; and all that is required by these by-laws, is, that the appellants be obliged to sell their tallow to the respondents when they demand the same at the rates fixed by the city laws, by which the price of candles is also to be regulated. As to the inhabitants, not free-men burgesses, they were never restrained from buying, only that it should not be pretended and used by the appellants as a handle to alter the privileges of the respondents.

The distinction which the appellants contended for, between raw and manufactured articles, is contrary to the statutes empowering the magistrates of every burgh to set a price upon timber, which is not supposed to be manufactured; and if the magistrates have a power of rating candles, (which is not denied,) the same reason will hold as to tallow, because the regulation upon candles follows in proportion with the regulation upon the tallow; and if the price of tallow be not regulated, neither ought the price of candles, by which the city will suffer a considerable prejudice.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentence or decree in the appeal complained of, whereby the Lords of Session found, "that the appellants ought to be restrained from rinding of tallow for sale," and also found, "that the magistrates and council of Edinburgh can oblige the appellants to sell their tallow to the candle-makers for making of candles to be consumed in the town at a price put thereupon by the magistrates and town council," be reversed.*

For Appellants, Spencer Cowper. Rob. Raymond.

For Respondent, J. Fekyl. W. Lechmere.

Case 32. William Collier, Captain of his Majesty's  
 Fountain- Ship the Mermaid, - - - Appellant;  
 Hall, 27 Dec. 1711.  
 Robert Stewart, Provost of Aberdeen, and  
 Forbes, Company, Owners and Freighters, and  
 13 Feb. Alexander Inglis, Master of the Ship  
 1713. Joanna of Aberdeen, - - - Respondents.

8th July 1715.

*Princ.*—A French privateer having captured a Scots ship, took a quantity of goods out of her, and some money from the ship-master, and upon payment of a ransom agreed upon, allowed the ship to depart with a ransom brief; the privateer having continued upon the coast, and being there captured by a British ship of war the money and goods taken by force, as well as the ransom, were to be restored by the captors.

THE ship Joanna of Aberdeen, was upon the 17th of May 1711, in her voyage to Virginia, captured off the Orkney Islands, by the Pontchartrain a French Privateer; and upon the capture, four bales and two casks of goods, parcel of the cargo, were taken out of the prize, and also 26 guineas out of the pocket of the respondent Inglis the Master.

The Pontchartrain with her prize brought up before Aberdeen, and a ransom of 200 guineas and 5*l.* being agreed upon, the same was paid by the respondents to the Captors upon the 22d of May. The Pontchartrain thereupon delivered to the Joanna a ransom-brief for her protection, and she proceeded on her voyage.

Upon the 28th of the same month of May, the privateer was taken upon the Scotch coast by the appellant, and in it were found the said four bales, and two casks of goods taken out of the Joanna, and money to the amount of the 26 guineas taken from the respondent Inglis, with the 200 guineas and 5*l.* paid for ransom.

The appellant having brought the privateer to Leith, it was, on the 12th day of June thereafter, adjudged and condemned as lawful prize by the Court of Admiralty there. The prize, with the goods on board, and money, were delivered to an agent for prizes, chosen as directed by the act 6 Ann. c. 13. intituled, "an act for the better security of the trade of this kingdom, by cruizers and convoys," and for the ends and purposes recited in the said act. The bales and casks of goods being put on board the ship Greyhound, by the agent, in order to a sale, the Greyhound with these goods, was cast away, and these goods were lost.

The Mermaid being in the Frith of Forth, and the appellant at Leith, the respondents brought an action against him before the Court of Admiralty in Scotland, for recovering the said 26 guineas and parcels of goods, and the said 200 guineas and 5*l.* ransom money, upon the ground, that since the privateer still continued

continued upon the coast of Scotland, and had not carried the goods and effects of the respondents *infra presidia hostium* the property of the same was not vested in the privateer, but continued with the respondents, in the same manner as the ship would have done if not ransomed; and this the rather, as the capture of a privateer was by a British ship sent purposely to cruise upon the coast for the protection of trade. The appellant did not make appearance to this action, and decree in absence passed against him on the 25th day of August thereafter.

In January 1712, the appellant brought a bill of suspension before the Court of Session, of the said decree of the Court of Admiralty, in regard that the same was pronounced while he was *absens reipublice causa*. The Court reponed the appellant against the said decree, and turned the same into a libel; and after various proceedings, the Court, on the 13th of February 1713, "Found that the property of the money and goods which were taken from the respondents by the said privateer, and not contained in the ransom bill, remained still with the respondents, and therefore, that the privateer having continued upon the coast of the kingdom, and being taken there by the appellant as commander of one of her majesty's ships of war, within the bounds of his cruise, he ought to restore such money and goods to the respondents, and declared they would advise the debate as to the contents of the ransom bill on Wednesday (then) next." Accordingly, on the 16th of February thereafter, the Court "Found that the 200 guineas and 5<sup>l</sup>, remained still to the respondents, and repelled the allegation that the ransom was *bona fide* received by the agent, in respect of the citation before the Admiral prior to the receipt, and remitted to the Lord Ordinary to hear parties on the import of the other receipt granted to the said agent prior to the citation before the admiral."

The appeal was brought from "two interlocutory decrees or sentences of the Lords of Session of the 13th of February 1713, and 16th of February 1714. (a)"

Entered  
6 May,  
1715.

*Heads of the Argument of the Appellant.*

The contract between the ransomers and the French was free, voluntary, mutual, and absolute; they re-delivering the ship, and the ransomer paying the 200 guineas and 5<sup>l</sup>. The ransom was a fair transaction according to the laws of war, whereby the ship Joanna purchased her freedom, and obtained a ransom-brief for protection from other privateers during the voyage; and the privateer having got the ransom money, *ex contractu*, the same must be considered as purchase money, and the property belongs to the privateer, and is transmitted to the appellant, and returns not to the first owner.

By the ransom-brief the ship and goods were protected against all other French ships, during her intended voyage, had she met

(a) It appears from the Cases that this is a mistake for 1713.

with ever so many before she had fully completed the same: And it is not reasonable, that the respondents, whose ship has finished her voyage and unladed her cargo safely in port, should now reclaim the ransom-money, on pretence that the privateer was chased and taken before she could get home to her own port, with the ransom money given for such protection.

As to the 200 guineas and 5*l.* *non constat* whether it was the same identical money so paid by the ransomers, for there passed six days from such payment, before the privateer was taken by the appellant; and the privateer in that time might have sent home the species of money received for ransom, or otherwise alienated and disposed of the same, and other like species of money might have been on board.

Admitting that there should be a difference between the specific 26 guineas, and the 4 bales and 2 casks of goods, and the ransom price the 200 guineas and 5*l.*, which the appellant contends there is not; yet the 26 guineas and goods were taken by force, and therefore, though the respondents should insist upon a restitution for them, yet the ransom-money was voluntarily given, and the ship redelivered for the common benefit of both parties, which gives a full and irrevocable property as to it.

And further the said 26 guineas, and the goods were taken before the ransom was agreed to, and must be presumed to have been thrown into the ransom, and quitted and given up accordingly, by the master's subsequent acceptance of the ransom-brief for his whole ship and cargo, and acquiescence therein.

#### *Heads of the Respondents' Argument.*

By the common and universal opinion of the best lawyers of all nations, the goods and effects taken on board any ship by an enemy, do not become the enemy's property unless they be carried *infra præsidia hostium*. Grotius's words are very express, "Hæ vero res, quæ infra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia Dominium nondum mutârunt ex gentium jure." And so are the opinions of other authors who write upon that subject. Till the effects are brought *infra præsidia hostium*, there are hopes of recovery of these goods from the enemy by the subjects or allies of the state from which they were taken.

This doctrine applies also to the 26 guineas taken out of the respondent Inglis's pocket, and to the four bales and two casks of goods which had been taken *vi majeure* before the ransom was agreed upon, and which form no part of the ransom-bill. But, further, even the 200 guineas and 5*l.* for the ransom must be accounted for to the respondents, since the property was not changed; for, supposing no ransom had been given, but that the ship and goods had continued in the possession of the privateer, there is no question, but they would have been restored upon the re-capture, and so ought the ransom which came in place of those. Or, supposing that the ransom-money had not been paid, but that the master of the ship had been detained as an hostage till the ransom money



money had been paid, there is no question but upon the re-capture the hostage would have been released, and the re-captor would have had no pretence to the ransom-money for which the hostage was kept. Indeed all agreements of this kind are involuntary, and are only gone into to prevent a greater evil, and therefore tacitly include the hope of a recovery by a subsequent capture of the enemy.

With regard to the identity of the money, the ship was taken the 17th of May, and brought up before Aberdeen to receive the ransom-money on the 22d, and upon the 28th she was taken by the appellant, a plain evidence that the same money was still there, since the privateer had been all that time upon the coast: And as it is not pretended, but the goods were on board the privateer at the re-capture, so the very sum of 226 guineas was found on board the said privateer, and no more gold, as appeared by the receipt of the agent, to whom the appellant delivered the same.

The appellant founded upon the act of parliament 6 Ann. c. 13. 6 Ann. c. 13. by which it is enacted, that if any privateer shall be taken as a prize by any of her majesty's ships of war, and adjudged as prize in any of her majesty's Courts of Admiralty, the commander, officers, and seamen who shall be on board such ships of war, shall, after such condemnation, have the sole interest and property in such prize so taken and adjudged to their own use, without further account to be given for the same. But this act only gave the officers and seamen the shares of prizes formerly belonging to the crown or admiral; but it does not concern the ships or goods belonging to British subjects or their allies retaken from the enemy, and therefore does not affect this case, the law being left as formerly. And if the appellant have paid the money, and delivered the goods belonging to the British subjects to the agent, he must blame himself, since the respondents commenced an action against him for recovery of the effects in question, before they were delivered to the said agent, as appeared by his receipt.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the interlocutory decrees or sentences therein complained of be affirmed.* Judgment, 8 July 1715.

For Appellant, *Nath. Lloyd.*

For Respondents, *Edw. Northey. Will. Hamilton.*

Case.33. James Watson of Saughton Esq; - - Appellant;  
Robert Watson of Muirhouse Esq; - - Respondent.

13th July 1715.

*Tutor and Pupil.*—Acceptance of the office of tutor found not proved by tutorial inventories, which were not judicially signed, and wanted writer's name and witnesses, unless posterior acts of administration were instructed; nor by a missive letter not holograph, and without solemnities, consenting to lend the pupil's money.

Certain acts of administration not sufficient to infer the acceptance of the office.

An assurance with 30*l.* costs.

**J**AMES Watson of Saughton, the appellant's father, by his last will and testament bearing date the 6th of March 1703, appointed the appellant his executor, and nominated Sir James Foulis, Sir Alexander Dalmahoy, Robert Watson of Muirhouse, the respondent's father, John Watson, the testator's brother, and William Watson, writer in Edinburgh, his cousin, to be tutors and curators to the appellant during his nonage, the said William Watson being always *sine quo non*; and he is also appointed by the testator to be manager and receiver of the whole estate, real and personal, that should belong to the appellant as heir or executor to the testator, with an allowance of 50*l.* of yearly salary, besides his charges; and he is ordained to make up his accounts yearly, at least once in two years, at the sight of the other tutors, John Watson, the testator's brother, being always one: The will further "declares, that none of the tutors and curators accepting the "office, shall be accountable or liable for any omission, but only "for their actual intromissions." A few days after executing this will the appellant's father died.

After his death, the several persons appointed by him, caused an inventory of all his real and personal estate to be made; and on the 27th of August 1703, three duplicates of this inventory were subscribed by them, and by three other persons who were nearest of kin to the appellant. These duplicates were exhibited by a procurator before the sheriff of Edinburgh, who, together with his clerk, signed the same. None of these duplicates had the writer's name inserted in them, nor were there any subscribing witnesses to them. The respondent's father died before the appellant had attained the age of 14 years; and about a year afterwards William Watson, the tutor *sine quo non*, died also.

After the appellant arrived at 21 years of age, he brought an action before the Court of Session against his surviving tutors and curators, and against the respondent as heir to his father, concluding that they should conjunctly and severally be decreed to be accountable in solidum to the appellant for the whole rents and profits of his lands, and all goods and effects received by them, contained in the aforesaid inventory; and he also insisted, that  
though

though the testator by his will had declared that no tutor or curator accepting the office should be accountable for omissions, but for actual intromissions only, agreeably to the act of parliament 1696. c. 8. empowering fathers to name tutors and curators with that quality; yet that such power was only given to fathers in *Leige Poustie*, whereas the appellant's father was on his death-bed when the will was executed. 1696, c. 8.

To prove the respondent's father's acceptance of the office, and intromissions with the appellant's estate, the latter produced one of the duplicates of the inventory before mentioned; and also two missive letters written upon one paper, directed to the said William Watson, wherein Sir James Foulis, one of the tutors, advises him that he was to pay some money he owed the appellant, and gives it as his opinion that the same should be lent to Mr. Foulis of Ratho; the other from Sir Alexander Dalmahoy, giving also his opinion that the pupil's money could not be better secured, to which last letter these words, "*Robert Watson consents*," are subjoined.

The respondent answered, that though his father had been appointed tutor to the appellant, yet he had never taken upon himself the office, by concurring with the other tutors in any acts of administration, nor intromitted with the appellant's estate; that the subscribing of the inventory (done out of friendship to the appellant, that he might know at his full age what estate his father had left) would not fix him in the acceptance of the office of tutor, because it was only a preparatory act required by the statute before entering upon the office, and the rule by which a tutor was accountable to his pupil when he intromits with the subject of that inventory. That the act 1696. c. 8. did not provide, that where a nomination of tutors, with such qualities as in the present case is made, though on death-bed, that the nomination should subsist, and yet the qualities be void. That the appellant, therefore, could not separate the qualities from the nomination, but ought either to hold the nomination void, and insist against the tutors as intromitters with his estate, in which case the respondent's father could not be affected; or if he held the nomination by the testator to be good, then the quality of being accountable only for intromissions would be a good defence for the respondent. For supposing the respondent's father had accepted of the office, (as he contended he never did) his acceptance being upon the faith of the quality expressed in the testator's will, he being at London when the nomination was made, could not know it was done on death-bed: Even supposing the nomination had been without any such quality, yet by the express directions in the will, William Watson was appointed sole factor, and tutor *sine quo non*, and the testator's brother *sine quo non* to the making up of the factor's accounts, so that the other tutors testamentary could never be accountable for the administration of William the factor, since he was not nominated by them, nor had they power to remove him.

The appellant, in reply, contended that the tutors having accepted their office, and made inventories of the estate, they were certainly liable in solidum; for it imported not that William Watson was tutor *sine quo non*, and factor and manager by the testator's nomination, since his intromissions as factor, in the construction of law, were the intromissions of the other tutors for whom he was factor, and subjected them in the same way and manner as if they themselves had intromitted. Nor did it alter the case that he was named factor by the testator, since he was still factor for the other tutors, and was ordained to account with them yearly, or at least once in two years, and it was their fault that he did not so account with them.

These matters in debate being reported to and considered by the Court, their Lordships, by three interlocutors on the 25th of November 1713, 28th January and 8th December 1714, "Found that the said Robert Watson, the respondent's father's signing the inventories, and judicially producing them by a procurator, did sufficiently infer his acceptance of the tutory, and that he could not have the benefit of the quality in the nomination from the act of parliament 1696, unless the will had been made in *Leige Poussie*."

So far the interlocutors of the Court were not appealed from.

The respondent afterwards recurred to a new defence, namely, that his father's signing the inventories was no proof of his acceptance of the tutory, for the signing thereof was neither done judicially in Court, nor attested by subscribing witnesses, nor the name and designation of the writer of the inventory inserted therein, and, therefore, that by the act 1681, which requires these qualities in all writings, it was absolutely null and void. For sustaining this allegation the respondent gave in a declaration or certificate of the clerks to the Sheriff Court, Commissary Court, and Town Court of Edinburgh, of the usual form and manner of receiving inventories from tutors and curators, wherein the writer thereof was either designed with witnesses subscribing to the execution by the tutors; or otherwise, they had been produced by the tutors and curators themselves in Court, and signed there judicially by them and by the judge.

The appellant made answers, and the Court on the 27th of January 1715, "sustained the defence, that the inventories are null and void, not being judicially signed, and wanting writer's name and witnesses, and therefore found the same not sufficient to infer the tutor's acceptance, unless there be posterior deeds of administration instructed." The appellant reclaimed, and after answers for the respondent, the Court, on the 17th of February 1715, "adhered to their former interlocutor." The appellant having insisted that the letter formerly produced by him, in which the respondent's father consented to the lending out of his money was a sufficient posterior act of administration; after a debate on this point the Court on the 18th of February 1715, "found that the said letter is not probative, nor an act of administration."

"niftration liable to make the respondent account as if he had been tutor." And the cause being called before the Lord Ordinary on the 19th of February, his Lordship "affoizied the respondent from the said process."

The appellant prevented a farther petition to the court wherein he instanced some other acts of the respondent's father's administration, viz. his giving directions about the appellant's buildings, employing workmen therein and paying them, his putting the appellant to school, and ordering his stay and maintenance there, and he prayed that he might be allowed a commission for proving these and other acts of administration. After answers for the respondent, the Court, on the 26th of February 1715, "found the present acts of administration condescended on, with the former, are neither separately nor jointly relevant, and therefore affoizied the respondent."

The appeal was brought from "several interlocutory sentences or decrees of the Lords of Session of the 27th January, and the 17th, 18th, 19th, and 26th of February 1715."

Entered  
11th May  
1715.

*Heads of the Appellant's Argument.*

The act of parliament 1681. c. 5. on which the respondent's objection to the inventories was founded, related only to private deeds; but it did not respect inventories which are of another nature, given in judicially to the court upon citation of the pupil's nearest of kin, pursuant to the act of parliament 1672. c. 2. Among the solemnities prescribed by that act, these, of subscribing witnesses and designation of the writer are not to be found; and in the inventories in the present case, all that was prescribed in that act was observed, viz. the subscribing of the appellant's tutors and nearest of kin, and of the judge and clerk in court. 1672, c. 2.

Those inventories were also signed by three of the appellant's nearest relations, who were indeed the most proper witnesses, and were called as attesters thereof; and three copies made of the same.

If there had been any formality wanting, yet no tutor ought to take advantage against his pupil of his own informal deed, to which he is bound *ratione officii*: for, if it should be otherwise, tutors may seem to act according to law, and at the same time may lay a foundation for their own discharge by their own acts, made with a design that they may not be evidence against them; for the poor pupils cannot be a check, but the law must be a check upon them.

One of the copies which had been signed by the respondent's father, and by the said other tutors, and by the judge and clerk, as aforesaid, was produced by the respondent himself; and it was never in the least pretended by him, that his father's name thereto, or to either of the other copies, was not of his father's own proper hand-writing.

The declarations or certificates produced by the respondent were not made by the said clerks upon any order of reference to them from the Court of Session, but were voluntarily made by them

them at the respondent's instance. Nor do they give any account of the general practice of the nation in such cases, but only of those courts in Edinburgh, which do not contain a sixth part of the instances of the kingdom; and yet even in these declarations there is one inventory mentioned to be exhibited as the inventories in the present case were, without the writer's name or designation, or attesting witnesses; nor was there any precedent either produced or quoted of any inventory being rejected or annulled for want thereof. And if the inventories in question were any way defective, the judge ought not to have received them or granted administration thereon.

Though it was contended that the letter before-mentioned was no evidence, as wanting writer's name and witnesses also, yet it was never denied that the respondent's father's name, as consenting to the lending of the said money, was of his father's own proper hand-writing, and the appellant offered to prove the same by witnesses.

#### *Heads of the Respondents' Argument.*

Though the act 1672, c. 2., ordaining tutors to make up an inventory, does not statute, that these inventories should be signed before witnesses; yet it provides that these inventories should be judicially produced before the judge, and an act made thereon; and nothing is said to be produced judicially, but what is acknowledged and subscribed before the judge, which this was not; and the act 1681, c. 5. is general, and provides, that all writings to be subscribed by any party, wherein the writer and witnesses are not named and designed, shall be null. Since the date of that act no inventory without writer's name and witnesses, or not subscribed judicially, was ever exhibited or pleaded in judgment, as appears from the certificate of the proper officers where inventories are commonly recorded.

A tutor once accepting might be bound to make his own deeds formal, but since the respondent's father did not accept, neither can he be bound to complete the deed, from which his acceptance is to be inferred.

The acts condescended upon by the appellant were no acts of administration as tutor, but only acts of humanity and friendship. They were, that the respondent's father concurred with the other tutors in giving directions to repair a fence that had been made for defending the appellant's lands against the overflowing of the water; and that he employed workmen for that end; and that he had given his advice respecting the proper methods to be followed for the appellant's education. But it was never by law intended, that the advising with tutors made the adviser himself accountable as a tutor. On the contrary, the respondent's father having never concurred with the other tutors in disposing of the goods and effects of the appellant, nor in the letting, selling, or ordering of his lands, nor suffered himself to be inserted in any act as present at any sederunt or meeting of the other tutors, are plain proofs that he never accepted of the office of tutor, nor was  
looked

looked upon as tutor by those who did accept and undertake the management.

The letters or missive, produced by the appellant, was not probative against the respondent's father, being neither holograph nor subscribed before witnesses, and so was void by the said act 1681, c. 5. It was also plainly vitiated in the date, and so by the law of Scotland could be no proof; neither did it appear at what time it was subscribed by the respondent's father.

After hearing counsel, *It is ordered and adjudged, that the said Judgment, petition and appeal be dismissed, and that the said interlocutory sentences 13 July 1715. or decrees therein complained of be affirmed; and it is farther ordered, that the said appellant do pay or cause to be paid to the said respondent the sum of 30l. for his costs in this House.*

For Appellant, *Spencer Cowper. Rob. Raymond.*  
For Respondent, *J. Jekyll. David Dalrymple.*

The judgment of the Court in that part of the cause, previous to the subject of the present appeal, by which it was found, that a tutor was not to have the benefit of a clause, that he should not be accountable for omissions, but only for actual intromissions, where the will was not made in *Leige Poussie*, is worthy of notice, though by the subsequent judgment of the Court, the effect of this was set aside.

Charles Menzies Esq; of Kinmundie, Writer  
to his Majesty's Signet, Uncle of the  
Respondents, - - -

*Appellant;*

Case 34.  
Fountain-  
hall, 21 June  
1712.

Helen, Barbara, and Jean Menzies, Sisters  
to the deceased Thomas Menzies of  
Kinmundie, and Robert Muir Merchant  
in Aberdeen, Husband to the said Barbara,  
and as their Assignee for his Interest, - *Respondents.*

25th July 1715.

*Sale* — A person who had purchased lands at a public sale, at 20 years purchase of a proved rental, afterwards claims deductions: 1st, Because the reinds were held by a tack from the College of Aberdeen then near expired; 2d, Because, as he alleged, the rental was too highly stated by one Chalder; 3d, Because he was kept out of his purchase for six years, during which time the person in possession only accounted for the rents, which were less than the interest of the price; 4th, A deduction of certain expences he had been put to, in adjusting the debts due by the estate and in the person of the last possessor thereof. The Court having refused these deductions, and allowed the sellers 30l. of expences, the judgment is affirmed.

In this case the purchaser had been employed as agent to conduct the sale, proof of rental, &c.

THOMAS Menzies, late of Kinmundie, left one son, and the respondents his daughters, all under age, to whom he had appointed John Hamilton, his brother-in law, tutor and curator.  
The

The tutor, finding there were several considerable debts due by the said Thomas Menzies, which would exhaust the estate if not sold, applied to the Court of Session, setting forth the several debts due by the deceased, with a rental of the estate of Kinmundie, and praying leave, notwithstanding the heir's minority, to sell the lands to the highest offerer.

The appellant, the brother of the deceased and uncle of the respondents, was employed by the tutor in his profession to take the proper methods for proving the said debts and rental. A commission was taken out accordingly, and the tenants and several other persons were examined upon oath as to the rental of the lands; upon report of which, and upon comparing a list of the debts with the then constituted rental, amounting to 1124*l.* 7*s.* 6*d.* Scots, after all deductions, the Court, in July 1701, granted liberty to the tutor to bring the said estate to a sale, either in whole or in part, for the best price that could be got.

The lands were accordingly advertised for public sale, and at the day appointed, the appellant offered 20 years purchase of the free rental, or 2000 merks for each chaldier, or 100 merks of yearly rent. Alex. Gordon of Pitlurg, however, who was outbid by him at the sale, entered into a posterior agreement to give more than the price offered by the appellant: and, accordingly, on the 19th of January 1702, the tutor executed a disposition of the estate in favour of Mr. Gordon as the highest offerer. Soon after the brother of the respondents died.

The appellant brought an action before the Court of Session against the said John Hamilton the tutor, Mr. Gordon of Pitlurg, and also against the respondents the daughters, as representing their brother, to have it found that he was the true purchaser of the said lands of Kinmundie. After various proceedings in this action, the Court in 1703 found "that the practices and contrivances of the tutor and Alexander Gordon were illegal, and that the said Alexander Gordon having offered at the sale, and being then overbid was *in mala fide* to enter into any after-articles with the said tutor, in avoidance of the aforesaid sale; and found that the appellant had the sole right and title to the said lands of Kinmundie, by virtue of the articles of sale; and ordained the defenders to divest themselves of any right, title, or interest, they had to the said lands, in favour of the appellant, and ordained him to enter into a bond with security for the purchase-money of the said lands, according to the terms of the articles of sale, and that within 40 days after date of the decree of preference."

According to this decree, the bond was drawn and settled at sight, and by the direction of the court; and thereby the purchase money, rated according to the then constituted rental, was payable by the appellant to the creditors upon the estate, in particular to the said Alexander Gordon, who had paid part of the price, and had purchased in the rights of several creditors, and afterwards the overplus, if any should be, was to be paid to the respondents. The appellant, after this, had an action with Mr. Gordon,



Gordon, to settle the amount of the claims of the latter, which depended for several years; but afterwards in 1707, the appellant having cleared with Mr. Gordon, entered into the possession of the said lands.

The price at which the appellant purchased was 22,486*l.* 13*s.* 4*d.* Scots; the mother of the respondents had an annuity paid to her yearly of the sum of 333*l.* 6*s.* 8*d.* being the interest of 6,700*l.* Scots; and the debts amounted at the time of the sale to 13,023*l.* 19*s.* 8*d.* so that the balance immediately to be paid to the respondents was only 2762*l.* 13*s.* 8*d.* Scots. Differences arising between the appellants and the respondents, after the marriage of Barbara, the respondents commenced an action of count and reckoning against the appellant before the Court of Session, to compel payment to them of the balance of the said price. In this action the appellant gave in a stated account of charge and discharge, wherein he charged himself with the full price of the said lands, according to the bond entered into by him, and discharged himself by nine articles, five of which being for debts paid by him according to the tenor of the bond, were not controverted: the other four form the subject of the present appeal.

The 1st of these was a deduction from the price upon account of the teinds of the lands being made part of the rental, with the deduction of a yearly tack duty payable to the College of Aberdeen, from which they were held by two tacks nearly expired. After answers for the respondents, the Court at first decided in favour of the appellants' claim, but on the 22d of July 1712, "found that the appellant should have no deduction of the price, on account of any defect in the rights to the teinds."

The appellant, 2dly, claimed a deduction from the purchase money, to compensate an alleged deficiency in the rental, as being too highly stated by one Chalder. Upon this point a proof was taken for both parties, and the court, upon the 27th day of June 1713, "found that the appellant could have no deduction upon the account of any shortcoming in the rental."

The third deduction claimed by the appellant was, that Mr. Gordon being possessed of these lands for six years, when the appellant entered to possession, Mr. Gordon accounted to the appellant only for the rents of the lands; but that being less than the interest of the price paid by the appellant, and for which he was accountable, and the difference being about 840*l.* he claimed deduction thereof accordingly. Upon this point the Court, on the 19th of December 1712, "found that the appellant could have no deduction upon account of the difference, between the rents of the lands and the interest of the price."

The fourth deduction claimed by the appellant was the sum of 1000*l.* Scots, as the costs he had been at in adjusting the debts claimed by Mr. Gordon, the benefit of which accrued to the respondents. The Court, on the 16th of December 1712, "found that the appellant could have no deduction upon account of his

"his expences in his action against Mr. Gordon." And to this interlocutor the court adhered upon the 17th of January and 5th of February thereafter.

The respondents afterwards petitioned the court to allow them their expences, and an account thereof was given in. On the 29th of July 1713, the Court found "that the appellant was liable to the expences, and modified the same to 30*l.* sterling."

The appeal was brought from "several interlocutors of the Lords of Council and Session, made on the behalf of the respondents."

Entered,  
29 April  
1715.

### *Heads of the Argument.*

The appellant again set out his claims on the four points before stated.

The respondents answered on the 1st. Point. That the appellant was the only person employed in the business of proving the rental and value of the estate; and when it was sold, he knew all its circumstances, the real value of the lands and what title there was to the teinds. When the estate was sold, all that was agreed upon was, that the rental then was so much free rent *after deduction* of feu-duties, minister's stipends, and *teind tack duties*; and at that price it was bought *per averfionem*, without any distinction between teinds or any other part of the estate. Since the appellant knew what the respondents had, the obligation on their part must only be understood to extend to make what they had good; and nothing is conveyed to the appellant but the lands and these tacks of the teinds; and therefore the appellant can claim no more than what was conveyed to him.

On the 2d Point. The rental had been proved by the depositions of the tenants and others before the sale, and the Court, upon advising these depositions, and the account of the true rental given in by the appellant himself, as agent for conducting the proof thereof, found the rental proved to be 1124*l.* 7*s.* 6*d.* Scots. At the rental so proved was the estate sold to Mr. Gordon; at that rental Mr. Gordon accounted to the appellant for the six years he was in possession, and the appellant had a conveyance from Mr. Gordon as he possessed it. The appellant, in his account against the respondents for this business, not only charges all his particular expences, but adds this article, "For the appellant's own pains in ordering this process of sale, making up inventories of debts, rentals, &c. and carrying on the whole business thereof from beginning to end, 100*l.* Scots." So that undoubtedly he knew what was the real value of these lands, and having bought the lands at that value, he ought to be concluded.

When a new probation was afterwards granted it was limited to the value of one or two particular farms. The appellant accordingly examined several witnesses; but when the proof came to be advised, there did not appear the least foundation for the deductions claimed. What was proved by him was only a small encouragement

ment given for two years to a tenant after a great scarcity; and that the rental proved at the sale was the constant rental ever before the said sale.

On the 3<sup>d</sup> Point. The appellant suffered no loss by Mr. Gordon's possession; for had the appellant been in possession himself, he could only have had the whole rent, and would have been accountable for interest. Besides, it was the appellant's own fault, that Mr. Gordon continued so long in possession, since he had judgment against Gordon to convey to him in 1703, which was two years after the sale. Mr. Gordon required the appellant soon after, by way of instrument, to take possession of the estate, but this the appellant declined; and at last Mr. Gordon was obliged to bring an action against the appellant to compel him to take the estate.

On the 4<sup>th</sup> Point. What the appellant did in the action with Mr. Gordon was for his own safety, because he could only pay such debts as were mentioned in the decree of sale: and whatever expence was incurred in this matter was not occasioned by the respondents, who were no parties to the action. And after all what the appellant pretends to have profited the respondents in, is not near half of what he claims as expences.

The respondents having been thus put to very great expence, they petitioned the court to have their expences allowed them, and gave in a bill, amounting to about 300*l.* sterling, which they were ready to make oath they had really expended. The appellant made great opposition to this, and the Court allowed the respondents 30*l.* of expences, which sum was all they got for the expences of the whole action.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutors therein complained of be affirmed.*

Judgment,  
25 July  
1715.

For Appellant, N. Lechmere. John Cumyn.  
For Respondents, Rob. Raymond. Will. Hamilton.

Case 35. John Murray of Conheath, - - Appellant;  
 Forbes,  
 16 June  
 1710. James Murray his younger Brother, Trustee  
 for Elizabeth Maxwell their Mother, - Respondent.

28th July 1715.

*Fact.*—The proprietor of an estate, burdened with apprisings, dying, leaves two sisters, whose husbands enter into a submission for themselves, and as taking burden upon them for their wives, with a person who had or appeared to have right to some of these apprisings: by the decret arbitral, they are decreed to be conveyed to the husbands and their wives, the husbands paying the price: the wives were heirs of these apprisings, and not the husbands.

SIR John Maxwell of Conheath, in 1636, made a settlement of his estate to Alexander Maxwell his son, and the heirs male of his body, *quibus deficientibus hereditas suis masculis, successoribus et assignatis quibuscunque*. In terms of this settlement, a charter was taken from the superior, upon which infeftment followed.

This Alexander Maxwell left issue a son John, (who died without issue), and two daughters, Elizabeth Maxwell, mother of the appellant and respondent, who married Gilbert Murray their father, and Margaret Maxwell, who married Alexander Maxwell of Park. Various apprisings had been obtained over the lands of Conheath; the rights to some of which were acquired by George Maxwell of Carnsalloch. This George Maxwell having entered to possession, and taken away the charter chest and writings belonging to the estate, the said Gilbert Murray of Urr, and Alexander Maxwell of Park, the husbands of the said Elizabeth and Margaret, whose brother was now dead, for themselves and in name of their wives, commenced an action against George Maxwell of Carnsalloch, before the privy council, complaining of his forcible entry into and possession of the estate, and carrying away the charter chest and writings. Mr. Maxwell was ordered to put the said charter chest and writings into the clerk's hands, but a transaction took place between the parties which put an end to this action.

On the 25th of January 1677, a submission was entered into, which set forth, that the said Gilbert Murray and Maxwell of Park, for themselves, and as taking burden upon them for the said Elizabeth and Margaret, their wives, elected one of the arbiters, and the said George Maxwell elected the other, to whom they referred all actions then depending, or that should arise between the parties concerning the lands of Conheath and the incumbrances thereon. This submission was subscribed by the said Gilbert Murray and Maxwell of Park, the husbands, but not by the wives. On the first of February thereafter the arbiters pronounced their decree, whereby they ordained the said George Maxwell to make over and surrender all the decreets of apprising upon the lands of Conheath, to which he had any right or title in favour of the

the said Gilbert Murray and Alexander Maxwell, and their wives, equally between them; the said Gilbert Murray and Alexander Maxwell paying 6100 merks Scots to the said George Maxwell, and performing some other conditions contained in the said decree. In obedience thereto the said Elizabeth and Margaret, with consent of their said husbands, by a writing subscribed by them, granted a real security over the said lands for the sum mentioned in the decree arbitral, to the said George Maxwell; but before the transaction was completed in this shape, and before George Maxwell had divested himself of any right in his person to the said lands, Gilbert Murray died. After his death, George Maxwell made over and conveyed the titles in his person to the said Alexander Maxwell, husband to the said Margaret, pursuant to the said decree arbitral, (Margaret having previously, as the respondent states, conveyed her moiety to her husband). The disposition mentions, that the said Alexander had paid the full sum awarded; and reserves one half of the incumbrances to be redeemable by the heirs of the said Gilbert Murray, or by the said Elizabeth his widow, or either of them, who had best right thereto.

In 1695 Elizabeth, the mother, conveyed all her right to the said lands and to the said decree arbitral, to her son, the respondent James, in trust for her own use. In May 1696, the appellant, who was a travelling chapman in England, executed in favour of the respondent James, who was bred to the law, a factory or power of attorney, giving full power to the respondent James to recover, receive, and obtain all lands, tenements, or rents, or any other thing whatsoever pertaining and belonging to the appellant as heir to his father, and to transact and compound all matters relating thereto, with a proviso of being accountable to the appellant; and this factory also mentioned, that it should be without prejudice to the respondent of any acquisitions made or to be made by his own industry.

Soon after the respondent James redeemed an apprising on the said lands in the person of one Maxwell of Miltoun. And he entered into a contract of division with the said Alexander Maxwell of Park, by which the lands of Conheath were divided between them, and the half of the money which had been paid and expended by the said Alexander Maxwell, was repaid to him by the respondent. In this contract the respondent took burden upon himself both for his mother and for the appellant his brother, for any right competent to him.

The appellant afterwards brought an action against the respondent before the Court of Session, to compel him to account for the rents and profits of the said lands from the year 1696, and also to make over to the appellant the decrees of apprising, which the respondent had acquired, and which the appellant contended did descend to himself as heir. After sundry proceedings, relative to the import of the letter of attorney or factory and the decree arbitral, the court, by several subsequent interlocutors, decreed in favour of the appellant.

A petition was afterwards presented in the name of Elizabeth Maxwell, the mother, setting forth that the right she had granted to the respondent was only in trust for her use, and praying that the interlocutors might be reversed at her instance: And at the same time the respondent put in a petition acknowledging his own right to be in trust only; and he insisted upon sundry acts done by his mother, both prior and subsequent to the decree arbitral, inferring her right of fee. The court, on the 10th of July 1713, "found, that the wives of Gilbert Murray and Alexander Maxwell, and not their husbands, were fiars of the apprisings and other rights decreed by the decree arbitral to be conveyed to the husbands and their wives." Sundry petitions were given in for the appellant, but the court, on the 28th of July and 12th of December 1713, and 23d of July 1714, adhered to their former interlocutor.

Entered,  
23 May,  
1715.

The appeal was brought from "several interlocutory sentences and affirmances thereof by the Lords of Council and Session, bearing date the 10th and 28th days of July and 12th of December 1713, and 23d of July 1714."

#### *Heads of the Appellant's Argument.*

Though the husbands had no antecedent right before the award, yet they might have purchased the lands or the apprisings that affected the same *Tanquam quilibet*, having on their own personal credit undertaken the price; and the appellant's father having died before the price was paid does not alter the matter, since it was paid thereafter by the appellant, his heir, or by the appellant's trustee, out of the profits of his estate. The husbands entered into the submission for themselves, and as taking burden upon them for their wives, but the wives do not subscribe the same or consent to that agreement; and though the decree arbitral ordains the apprisings to be conveyed to the husbands and their wives; yet it also ordains the husbands to pay the price. By the law of Scotland this will admit of no other interpretation, but that the husbands and their heirs should have the fee, and the wives the life-rent, as in the case of a bond made payable, or deed granted to a husband and wife.

(On the part of the appellant, various other facts are stated as tending to shew that the fee of the estate was not in the wives; but these facts being traversed or denied by the respondent are not here stated on either side).

#### *Heads of the Respondents' Argument.*

The husbands signed the submission in name of their wives, and as taking burden for them, and elected the arbiters expressly for their wives; and the sum to be paid is awarded against the husbands and in name of their wives. George Maxwell, too, the party on the other side is ordered to divest himself of all his pretended right, &c. to the husbands and the wives as parties submitters. Though the wives had not hitherto subscribed, yet in pursuance of the decree arbitral, they with consent of their husbands

bands granted a real security for the sum awarded upon the said lands belonging to the wives, and of which they were then in possession. And the husbands, subsequent to the decree arbitral, did acknowledge, in several writings under their hands exhibited to the Lords of Session; and mentioned in the decree, that the property was in the persons of their wives; and in particular the said Alexander Maxwell took a conveyance for his wife before George Maxwell would convey to him, which, if there were any room for doubt, is sufficient to explain and prevent any question as to the property of the said lands. Though the said real security, granted by the wives with their husbands consent, was not accepted of by the creditor, yet it was undeniable evidence of the sense and meaning of the parties. And no part of the money was ever paid by the appellant's father, but on the contrary by the respondent, in name of his mother, as her trustee, and it cannot be pretended that ever the respondent had any of the appellant's money.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutory sentences and affirmances thereof in the said appeal complained of be affirmed.* Judgment, 28 July, 1715.

For Appellants, *J. Fekyll. W. Lechmere.*  
For Respondents, *Tho. Lutwyche. David Dalrymple.*

William Habkin, Belt-maker in Edinburgh, *Appellant*; Case 36.  
Roger Hog, Merchant in Edinburgh, - *Respondent.*

19th August 1715.

*Annual Rent, Costs, and Expenses.*—Two tradesmen having contracted to clothe a regiment, and to divide equally under a penalty the sums to be received by virtue of an assignment of off-reckonings delivered to each of them: one of them afterwards receives a new assignment of off-reckonings, and a sum of money from the Treasury, and refusing to pay a balance due to the other, the Court ordained the person receiving the money, which, they found, fell under the first assignment, and their mutual contract, to pay the balance due to the other, which however was restricted to a smaller sum than was claimed: but the Court having refused him damage and interest; upon appeal the judgment is reversed, and the respondent is ordered to pay to the appellant the principal sum found due to him, with the interest thereof, from the time the respondent received the remainder of the money; and the Court is ordered to cause the costs and expences of the appellant in the action to be taxed and ascertained and forthwith paid to him by the respondent.

No specific sum being here awarded, proceedings afterwards upon the complaint of the appellant, relative to the taxing of his expences by the Court of Session, and resolutions and orders of committees and of the House thereon: a sum allowed to the complainant for his subsequent expences, in taxing costs.

IN January 1705, an agreement for cloathing a regiment of guards in Scotland was entered into between Lieutenant-General Ramsay, the Colonel of the regiment, of the one part, and

and the appellant and respondent of the other part: the appellant and respondent bound and obliged themselves, jointly and severally, their heirs, &c. before the time therein specified, to deliver over to the said General or his order, cloathing for his said regiment: In consideration whereof, on the other part General Ramsay bound and obliged himself to execute an assignment of the off-reckonings of the said regiment unto the appellant and respondent until such time as out of the said fund they should be fully paid and satisfied the sum of 3151*l.* 10*s.* sterling as the consideration money for their cloathing the said regiment.

In February thereafter the appellant and respondent entered into another contract between themselves, reciting, That whereas they were bound jointly and severally to cloath the said regiment, and that it was just and reasonable to relieve each other therein, therefore the appellant on the one part, obliged himself to cloath the first battalion of the regiment, and the respondent obliged himself to cloath the second battalion, without any regard to the costs and charges either might be at in furnishing his respective battalion; and they expressly declared, that the money arising out of the fund to be assigned to them should be equally divided between them: And each of them was respectively to perform the contract to the other under the penalty of 500*l.* to be paid by the party failing to the party performing the same.

The appellant and respondent furnished their respective shares of said cloathing, but there being still some things wanting which were not contracted for, the respondent furnished some of these upon his own separate account, to the value of 106*l.* 1*s.* and the appellant furnished the remainder to the value of 27*l.* 8*s.* 4*d.* sterling.

On the 29th of October 1705, the Earl of Dalhousie, who then had the command of the said regiment, granted two assignments of the said off-reckonings or cloathing fund, one whereof was to the appellant for the sum of 1603*l.* 13*s.* 4*d.* being his just share of the total sum of 3285*l.* 9*s.* 4*d.*; the other to the respondent for 1681*l.* 16*s.* for his share and proportion. By each of these assignments the appellant and respondent were expressly *simul et semel* intitled to the payment of the cloathing money, from and after Whitsunday 1705, until such time as their respective sums should be fully and completely satisfied. Pursuant to these assignments several orders or precepts were issued from the then Commissioners of the Treasury to the Receivers General, in consequence of which the appellant and respondent received to the amount of 2956*l.* 5*s.* 6*d.* sterling, which was equally divided.

The respondent afterwards entered into a separate agreement for cloathing one half of the said regiment from 1st of October 1706 to 1st of February 1707, and was to have 631*l.* allowed him for the same, for which the Earl of Dalhousie gave him a further assignment of the off-reckonings. There being also a balance still due to him upon the former account, he, on the 30th of April 1708, procured an order from the Commissioners of the Treasury



Treasury upon the paymasters of the army for 721*l.* of which also he received payment.

A balance on the original account being still due to the appellant, when the respondent received the last-mentioned sum of 721*l.* the appellant made application to him for payment of that balance, contending that the off-reckonings or cloathing-money of the regiment were appropriated for the payment of their respective assignments, and not otherwise applicable till they were paid; and that this order for payment to the respondent commenced before the appellant's assignment was satisfied, and the respondent's accepting of such order was a breach of the articles of agreement. Upon the respondent's refusal, the appellant gave him a charge of horning upon the articles of agreement, for the said penalty of 500*l.* The respondent raised a bill of suspension before the Court of Session; and after sundry preliminary proceedings, the foresaid charge and contract were turned into a libel, and the appellant insisted for payment of the balance due to him with interest, since the money had been received by the respondent on his last order.

After sundry further proceedings in this action, the court, on the 25th of June 1713, "found that the sums paid to the respondent by virtue of the order for 721*l.* sterling, being the "cloathing-money from the 1st of October 1706 to the 1st of "February 1707, fell under the assignment formerly made to the "appellant and respondent, and under their mutual contract, "whereby the money was to be equally divided between them "under the penalty of 500*l.* and ordained the respondent to pay "to the appellant a proportional part of the sums received by "the respondent in so far as the former assignment to the appellant remained unsatisfied." It was afterwards remitted to the Lord Ordinary to settle the accounts between the parties, and the appellant claimed a sum of 216*l.* as due from the respondent; the respondent gave in an account also, and the Lord Ordinary at first found a balance of 192*l.* 7*s.* 2*d.* due to the appellant; but this sum was afterwards restricted (by the respondent's making oath to sundry articles of deduction, as the appellant states) to the sum of 166*l.* 19*s.* 1*d.* For this latter sum decree was given by the court, in favour of the appellant, upon the 27th of February 1713; and this decree was acquiesced in by all the parties.

The appellant afterwards presented a petition to the court, praying to have the interest of the sum decreed for allowed to him from the time the respondent received it from the government, together with the expences of the action; or otherwise that they would order the respondent to pay the foresaid penalty incurred through his breach of the said agreement, in lieu and satisfaction of the said principal sum, interest and expences. The court, by several interlocutors, the last of them upon the 24th of February 1714, "refused the desire of the said petition."

The appeal is brought from "several interlocutors of the Lords Entered,  
"of Session, and in particular a decree made by the said Lords 3 June 1715.  
"the 24th of February 1714."

*Heads of the Appellant's Argument.*

The respondent committed a manifest breach of the said contracts and of the faith and trust of copartnership; for without any power or authority from the appellant, or giving any notice to him, he in a clandestine manner made application to the treasury, and obtained from them an order or precept for the whole remainder of the money due upon both the said assignments. When the respondent, too, appeared to the action in the court below, he positively denied that he had received any of the appellant's money, which put the appellant to great expence in producing the books of the treasury, the order of the Lords Commissioners to pay the said 72*l.* and the respondent's receipt for the money. The appellant has been put to great trouble and charges for four years successively in this business; and he claims to have awarded to him his said reduced principal sum and the interest thereof, together with his expences in the court below, to be ascertained by the appellant's own oath, in consideration that the said principal sum was reduced in a great measure by the oath of the respondent; or otherwise the penalty contained in the contract in lieu and satisfaction thereof.

*Heads of the Respondent's Argument.*

Though the court did decree the respondent to allow the benefit of this payment to the appellant, as to the balance due to him of the former assignment, yet that was because these prior assignments were preferable upon the whole fund of cloathing-money, nor did the court find any *mala fides* in the respondent. There can be no manner of reason for expences against the respondent, especially since the respondent never declined accounting with the appellant; on the contrary, he, by form of instrument, required him to settle accounts, but the appellant declined it. Nor was any part of the expences in this action occasioned by the respondent, but by the appellant's irregular proceedings in suing out execution upon the agreement, without condescending upon any particular breach of it, or liquidating any sum due to him. That occasioned the bill of suspension, and the greatest part of the expences; and in all the points relative to this proceeding of the appellant's, wherein the respondent and he were adversaries, the court gave it against the appellant by suspending his charge, and first turning it and afterwards the contract into a libel, whereby the court sustained that contract as a foundation for an account, which was never opposed by the respondent. Had the appellant given in a fair and just account the subsequent expences would have been but small, but the appellant insisting for 216*l.* as the balance due to him, and denying several articles the respondent charged him with, this obliged the respondent to be at great expence in recovering several vouchers of the account from the Commissioners and others, and by these deductions the account was balanced 166*l.* 19*s.* 1*d.* which the respondent submitted to. The costs then were occasioned by the appellant's irregular proceeding,

ceeding, and since the respondent submitted to account and pay the balance; and since the appellant's demand was restricted from 216*l.* to 166*l.* 1*9s.* 1*d.* there is no reason to load the respondent with expences. On the contrary, the appellant ought to pay expences; for it is an undoubted principle in the law of Scotland, that a pursuer claiming more than is really due to him, and occasioning trouble and expence to the defender in defending that claim, and restricting it to a just balance, can never pretend to expences; but on the contrary, ought to pay them. The Court of Session, therefore, refused the appellant's demand at first reading his petition, and without obliging the respondent to give in an answer. Nor can the appellant pretend to any part of the penalty, since the court has not found the respondent guilty of any breach of the articles: And as to interest there is no reason for that, since in this case it is neither due *ex pacto* nor *ex lege*, which are the only cases where interest is allowed.

After hearing counsel, *It is ordered and adjudged that the several interlocutors and decree complained of in the said appeal whereby the Lords of Session did refuse the appellant's demands by his bill exhibited to them as to interest and costs be reversed: And it is further ordered that the respondent do forthwith pay, or cause to be paid to the appellant, the principal sum found due to him, with the interest thereof, from the time the respondent Hog received the remainder of the money due on the two first assignments made of the off-reckonings in question. And further, that the said Lords of Session do cause the costs and expences of the said appellant in the said suit to be taxed and ascertained, and that the same when so taxed be forthwith paid to the appellant by the said respondent.*

For Appellant, - Rob. Raymond. John Cumyng.  
For Respondent, J. Jekyll. Will. Hamilton.

Judgment,  
19 Aug.  
1715.

A petition of William Habkin was presented to the House and read, reciting the judgment on hearing his appeal, whereby it was remitted to the Lords of Session, to tax the petitioner his costs of suit; and complaining, "that the said order is eluded," and praying, "that the same may be made effectual for the petitioner's relief, touching the costs both here and in Scotland, by explaining the said order in such manner as to the House shall seem just." This petition was referred to a committee to report thereon.

Proceedings  
relative to  
these costs,  
Journal,  
1717-18.  
Feb. 27.

The Earl of Clarendon reported from the said committee, March 8.  
"That their lordships have accordingly considered the said petition, and have examined into the facts therein alleged, and find that on hearing the petitioner's appeal, the 19th day of August 1715, the House did reverse the interlocutors," &c. (here the judgment is recited): "the committee likewise inform the House, that the petitioner produced before them his bill of costs, both here and in Scotland, amounting to 408*l.* sterling, which he exhibited before the said Lords of Session on the 3d of February 1716; but they found that by the judgment of this House the expences craved in the process depending

“ before the Lords of Session were only remitted to be determined by them, which were refused; and against which the petitioner appealed; and therefore remitted to the Lord Grange to modify the said account, or report as he should find just; whose lordship, on the 29th of November 1717, having considered the account of expences given in by the said William Habkin of the suit before the Lords of Session, amounting to the sum of 95*l.* 8*s.* 6*d.* Scots, modified the same to the sum of 760*l.* Scots; and decreed that is decreed therefore: but upon a representation made by Roger Hog, merchant in Edinburgh, the respondent to the petitioner's said appeal, the 1st of December following, the petitioner was, on the 5th of the same month, directed to see and answer; and in the mean time the extracting the said decree was stopped: and some short time after the said account, with the instructions thereof, and the judgment of this House, were ordered to be put into the clerk's hands; and it did not appear to the committee, that any further proceedings have been had thereupon. And their lordships, upon consideration of the whole matter, are of opinion, that the said Lords of Session have rightly proceeded to tax only the costs of suit before them, and not the costs of the petitioner's appeal to this House; and that no final order should be made by this House upon the petitioner's complaint, touching the said costs, until it be seen what costs the Lords of Session will allow: but in respect of the great delay which it appears to the committee has been in the taxing the petitioner's costs ordered by this House, the committee are likewise of opinion, the Lords of Session should tax and allow the petitioner the costs he has or shall be put to in the taxation of his said costs.”

Which report being read by the clerk, was agreed to by the House.

1719-20.  
March 10.

A petition of Mr. Habkin was presented to the House and read, complaining “ that the Lords of Session in Scotland have not taxed his costs, pursuant to former orders of this House; and praying such final order may be made, touching his costs, both here and in Scotland as shall be thought proper for the petitioner's relief.” Which was referred to a committee to report.

1710.  
May 17.

The Earl of Clarendon reported from the said committee, “ That their lordships having caused notice to be given of the complaint to one Roger Hog, merchant in Edinburgh, who was the respondent to the petitioner's appeal, and being attended as well by an agent on behalf of the said Hog, as by the petitioner himself and his agent; their lordships took the said petition into consideration; and find, that this House, on the 19th of August 1715, upon hearing the petitioner's appeal, did in part reverse a decree of the Lords of Session therein complained of; and directed them to cause the costs and expences of the petitioner in the suit between him and the said Hog, to be taxed and ascertained, and that the same, when so taxed, should be forthwith paid to the petitioner.

“ That

" That the petitioner having exhibited the said order, as also  
 " his account of expences, to the said Lords of Session, the same  
 " was by them referred to the Lord Grange, to be taxed accord-  
 " ingly; and the said account was by him modified to the sum  
 " of 63*l.* sterling or thereabouts.

" That the committee were informed, the said account or bill  
 " of costs was by the Lord Grange so taxed or modified *ex parte*,  
 " and a decree made thereon; but upon the said Hog's repre-  
 " sentation, in four or five days after, the petitioner was directed  
 " to see and answer; and in the mean time the extracting the  
 " said decree was stopped; and some short time afterwards, the  
 " said account with the instructions thereof, and the order of  
 " this House of the said 19th of August were ordered to be put  
 " into the clerk's hands: notwithstanding this proceeding, the  
 " petitioner, without complaining to the Court of Session of the  
 " taxation of the said Lord Grange, thought fit to take up his  
 " account, or bill of costs, and vouchers from the clerk, and to ap-  
 " ply to this House by petition, complaining of the said taxation,  
 " and desiring that the above-mentioned order of your lordships  
 " on hearing his appeal might be made effectual for his relief,  
 " touching his costs both here and in Scotland: and a com-  
 " mittee being appointed to consider of the said petition; their  
 " lordships, on the 8th of March 1717, reported it as their opi-  
 " nion, ' That the Lords of Session had rightly proceeded to tax  
 " only the costs of suit before them, and not the costs of the peti-  
 " tioner's appeal to this House; and that no final order should  
 " be made upon the petitioner's complaint, until it should be  
 " seen what costs the Lords of Session would allow: ' but in re-  
 " spect of the delay in taxing the petitioner's costs, it was like-  
 " wise their opinion, ' The Lords of Session should tax and allow  
 " him the costs he had or should be put to in the taxation of  
 " the said costs: ' And your lordships agreeing with the com-  
 " mittee in their said report, the petitioner applied again to the  
 " said Lords of Session, pursuant to the directions therein con-  
 " tained: And here the committee think proper to observe, that  
 " on the 11th of February 1717, but a few weeks before the  
 " above-mentioned report was made, your lordships, upon a  
 " petition from one Mrs. Lyon, touching the taxation of her  
 " costs in Scotland, did direct the Lords of Session to tax and  
 " ascertain her costs and expences article by article. And the  
 " committee were informed, ' That the said Lords of Session  
 " conceived it was expected by your lordships that they should  
 " observe the like method in the re-taxation of the petitioner's  
 " account or bill of costs, as was done in Mrs. Lyon's, and there-  
 " fore proceeded accordingly. And having fully heard the parties  
 " on both sides in relation thereunto, and duly considered the  
 " acts of regulation which are authorized by acts of parliament  
 " in Scotland, regulating the fees about the Court of Session  
 " there, the whole Lords went through the said account or bill,  
 " article by article, and taxed the same at 2*l.* sterling or there-  
 " abouts, and allowed for costs of such taxation 8*l.* 6*s.* 8*d.* or  
 " there-

"thereabouts, the reasons of which taxation are particularly expressed in their interlocutor for that purpose ;' which sums so taxed and allowed, the committee were likewise informed, the said Hog did immediately, by a notary, offer payment of to the petitioner, but he refused to accept thereof :

"The committee, before they conclude, think proper only further to observe, that your lordships having formerly been of opinion, the Lords of Session had rightly proceeded to tax only the costs of suit before them, and not the costs of the petitioner's appeal ; and your said order of the 8th March 1717, directing the Lords of Session to tax and allow the petitioner the costs he had or should be put to in the taxation of his costs, having been complied with in the allowance of the said 8*l.* 6*s.* 8*d.* for that purpose as afore-mentioned ; that therefore the said Lords of Session have proceeded agreeably to the orders of this House, and have not disregarded the authority of your lordships' last order, as particularly complained of in the petition.

"Which report being read by the clerk, was agreed to by the House : And the order and judgment of this House of the 19th of August 1715, on hearing the petitioner's appeal, being read :  
" 'It is ordered by the Lords Spiritual and Temporal in parliament assembled, that the said petition be and is hereby dismissed this House.' "

Case 37. Katherine Lyon, Widow of John Lyon of Muirensk Esq. - - - - - *Appellant ;*  
The Right Hon. John Earl of Aboyne, an Infant, and others, - - - - - *Respondents.*

22d August 1715.

*Costs and Expenses* — A person, having right to the balance of the price of an estate, which price was stipulated for in an agreement with penalty, obtains decrees in several different actions for principal and interest ; and in the last of these actions, insists for expenses of all the former actions : the Court having found that in that action the expenses of the others could not be allowed because there was *probabilis causa litigandi*, and since she did not insist for expenses in her other actions ; upon appeal the judgment is reversed, and the Court ordered to cause the costs and expenses of all the actions to be taxed and paid to the appellant.

Subsequent proceedings of the House of Lords on two complaints by the appellant, that the Court had not taxed her costs : the House by a committee afterwards taxes the costs and expenses of the Court of Session, and the expenses of the said two complaints, and ordains the respondent (a minor), his tutors and curators, to pay 61*l.* 4*s.* 4*d.* to the appellant for her costs and expenses.

ON the 3d of January 1667, Charles Earl of Aboyne, grandfather to the respondent Earl John, entered into articles of agreement with John Lyon of Muirensk, the appellant's late husband ;

husband; whereby the said John Lyon, on the one part, bound himself to make up a complete right and title in his person to certain lands in the shire of Banff, and thereupon to convey the same to the said Earl Charles on or before the 15th of May then next ensuing, in consideration whereof, the said Charles Earl of Aboyne on the other part, agreed to pay the sum of 9000 merks, on or before the then next term of Whitsunday; and both parties bound themselves mutually to the performance of that agreement under the penalty of 3000 merks.

In pursuance thereof, Earl Charles paid to the said John Lyon the sum of 5500 merks, part of the price, so that there then only remained a balance of 3500 merks, and entered to possession of the lands, in which he, and those claiming right from him, continued ever after. John Lyon not having made up titles in his person according to the said agreement, the said Earl had recourse to the legal diligences of horning, caption, and inhibition to oblige him to perform his part of the articles; and his Lordship afterwards in 1670 apprised the said lands.

On the 24th of May 1678, the said John Lyon executed an assignation of the said balance of 3500 merks to one John Riddoch. John Lyon died in December 1700, leaving the appellant in low circumstances.

In 1706, 39 years after the date of the agreement Riddoch the assignee commenced an action before the Court of Session against the respondent Earl John, a minor, for payment of the said balance of 3500 merks with interest due thereon. In April 1707, the said Riddoch assigned his right to the appellant after which the action was carried on in her name. The respondents contended that the appellant's late husband had not performed his part of the agreement, but the appellant insisting that the respondent and his predecessors had been in possession of the lands for 40 years, and that therefore she was entitled to the interest of the money, as she would have been to the profits, she craved decree for interest only. On the 7th of November 1707, the Court decreed the respondent to pay the interest due on the said 3500 merks, and this decree was extracted on the 28th of February 1708.

The appellant by virtue of this decree arrested the rents in the hands of the respondent's tenants; and brought an action of forth-coming against them to pay these rents to her till she should be satisfied for the interest decreed to her. Opposition was made by the tenants and by Lord and Lady Kinnaird, who had a jointure upon these lands, but in June 1709, the Court decreed the tenants to pay their rents to the appellant till she should be satisfied the said interest in arrear; and this decree was adhered to on the 23d of February 1710. Lord and Lady Kinnaird afterwards brought an appeal against the same, but their Case, No. 5: appeal was dismissed with 40*l.* costs to the present appellant.

She also brought an action of adjudication against the respondent's estate, in which she obtained decree in her favour on the 10th of June 1709; and afterwards brought an action of mails and duties against the respondent's tenants to pay their rents to her.

And

And further she brought an action against the respondent for recovery of the balance of 3500 merks, due on the original principal sum, and of a part of the penalty in the agreement corresponding thereto. On the 10th of February 1710, she also obtained decree in this action in her favour for 1637*l.* 14*s.* Scots of principal sum due to her after all deductions, together with a proportion of the penalty, to bear interest till paid.

The respondent brought a bill of suspension of these several decrees. But on the 12th of February 1712, the Court adhered to their former decrees, with this quality, that if principal and interest should be paid on or before the 15th of May then next, the respondent should be free from the penalty. The respondent reclaimed against this interlocutor but after various proceedings, the same was adhered to, on the 27th of February 1714.

In the mean time, the appellant had presented a petition to the Court, stating that she had been put to great expences in recovering the small sum due to her, that she had prevailed in all the actions brought by her or against her, and therefore praying that the Court would allow her the expences of these actions. The Court on the 26th of February 1714, found "that in this process, the expences of the appellant's other processses could not be allowed her, since there was *probabilis causa litigandi*, and since she did not insist for expences in her other processses." The appellant reclaimed and the Court on the 10th of June 1714, "adhered to their former interlocutor, and modified her expences to 250*l.* Scots." She again reclaimed, and contended that by the interlocutor of the 12th of February 1712, it was declared that if principal and interest was paid on the 15th of May then next, the respondent should be free from the penalty; but that as the respondent had not made payment in terms of that interlocutor she was entitled to the penalty. The Court on the 24th of June 1714, "adhered to their former interlocutors."

Entered,  
23 May  
1715.

The appeal was brought from "several interlocutors of the Lords of Council and Session of the 26th February, the 10th of June 1712, the 26th of February 1714, and the 24th of June 1714 (a)."

#### *Heads of the Appellant's Argument.*

Costs are in cases similar to the present to be allowed by the law of Scotland: and the appellant made it appear in the Court below, that her expences amounted to more than 400*l.* Sterling, besides the expences of the last action.

The appellant has been forced to leave her native country, and spend nine years in obtaining seven decrees, before she could come at her money, due upon so clear a demand, against the most vexatious and obstinate defence.

(a) In this case, the interlocutors appealed from cannot be correctly fixed by their dates; but in the appellant's case, she mentions, that she "appeals from these interlocutors by which she was refused part of the penalty and her expences or costs."

Though



Though there have been different actions, yet they were such as were necessary by the law of Scotland, and all founded upon the same most clear demand, and occasioned by the respondent's groundlessly contesting her indisputable right. And the appellant had much better have sat down under the loss of her debt, if she shall not be re-imburshed the expences she was forced to be at, in prosecuting her right.

*Heads of the Respondent's Argument.*

The appellant founded her argument in the Court below upon the acts of the Scots Parliament, 1587 c. 43. & 1592 c. 144. with regard to damages and expences. But from these and other acts it appears that the Judges have the sole power of modifying expences; and the intent of the acts being to suppress vexatious law suits, therefore the Judges have ever construed them by observing that intent, viz. in allowing expences where an action appears vexatious, and in acquitting therefrom, when there is *probabilis causa litigandi*, as they found in the present case. It is not obvious therefore, after what manner these acts, or any of them can be construed for the benefit of the appellant, who all along has appeared so litigious and vexatious to a minor, and notwithstanding she has recovered and received principal interest and costs, for which she has given a discharge, yet still insisting for penalty and additional expences, she has appealed from several interlocutory sentences refusing the same.

After hearing counsel, *It is ordered and adjudged that the several interlocutors complained of in the said appeal whereby the appellant was refused her expences or costs be reversed; and it is further ordered, that the Lords of Session do cause the costs and expences of all the suits and processes between the appellant and respondent mentioned or referred to in the said appeal, to be taxed and ascertained, and that the same when so ascertained be forthwith paid to the said appellant.*

Judgment,  
22 August,  
1715.

For Appellant, *J. Jekyll. Rob. Raymond.*

For Respondent, *N. Lechmere. John Cumyng.*

On the 21st of December 1717, a petition was presented to the House, in the name of Katherine Lyon, reciting the judgment on her appeal, and praying that "their lordships would please to enforce the same by effectually obliging the Lords of Session in Scotland to cause the petitioner's bill of costs to be taxed and ascertained, according to the acts of regulation of fees; and that the same should be then forthwith paid her without further suit." This petition was referred to a committee.

Proceedings  
relative to  
the taxing  
of expences  
in this case,  
1717, Dec.  
21.

The Earl of Clarendon reported from the Lords committees, "That the committee have accordingly considered the matter of the said petition; and in respect of the facts therein alleged, acquaint your lordships, that on hearing the petitioner's appeal, the said 22d of August, this House did reverse the several interlocutors

1717-18.  
Feb. 11.

"interlocutors

“ terlocutors of the Lords of Session therein complained of, where-  
 “ by she was refused her expences or costs; and ordered the Lords  
 “ of Session to cause all the costs and expences of all the suits and  
 “ processess between the appellant and respondent, mentioned or  
 “ referred to in the said appeal, to be taxed and ascertained; and  
 “ that the same, when so ascertained, should be forthwith paid to  
 “ the appellant: the committee further inform the House, that an  
 “ authentic copy of the proceedings of the Lords of Session, since  
 “ the making the said order and judgment, had been, on the pe-  
 “ titioner’s part, produced before the committee; by which it  
 “ appears that the Lords of Session had, on consideration of the  
 “ petitioner’s account of costs and expences exhibited to them,  
 “ and produced before the committee, amounting to 538*l.* 4*s.*  
 “ sterling, modified the sum of 100*l.* sterling in name of costs  
 “ and expences, to be paid to the said Mrs. Lyon *Attour*, that  
 “ is above the several sums already modified and paid to her for  
 “ expences in the process above-mentioned: And it appeared to  
 “ the committee, that the sums mentioned to have been before  
 “ paid to her amounted only to the sum of 250*l.* Scots, being  
 “ about 20*l.* sterling, which in the said account, out of one article  
 “ is mentioned to be deducted: There was also on the part of  
 “ the petitioner produced to the committee the articles of regu-  
 “ lation concerning the Session, approved by his late Majesty  
 “ King William, in pursuance of an act passed in Scotland in the  
 “ 4th session of King William and Queen Mary’s first parliament,  
 “ intituled, ‘ Commission for regulation of judicatories;’ which  
 “ articles regulate the several fees and charges to be paid in rela-  
 “ tion to prosecutions in the said court; and by the said articles  
 “ it is expressly directed, ‘ That in all causes where the Lords  
 “ at the conclusion thereof, shall find the succumber,’ that is,  
 “ the party who loses the cause ‘to have been calumnious or  
 “ litigious they shall take in an account from the party prevailing  
 “ upon his oath, of the expences and damages that he hath been  
 “ put to in that process; and that then they decern, or, in case  
 “ of extravagance tax and modify the said expences and damages  
 “ to be paid by the succumber to the party prevailing as said is.’

“ That the committee having been directed by the House to  
 “ search for precedents, think it proper to inform your lordships,  
 “ that they find none, of the like nature; the only one insisted  
 “ on, on the part of the respondents (being the case of Sir  
 “ Andrew Kennedy) widely differing from the case of the pe-  
 “ titioner:

“ And upon the whole matter the committee are of opinion,  
 “ that the Lords of Session have not taxed and ascertained the  
 “ petitioner’s costs and expences agreeably to the forementioned  
 “ order and judgment of this House, on hearing her appeal; and  
 “ are likewise of opinion, that the said Lords of Session be di-  
 “ rected to tax the petitioner’s costs, expences, and damages,  
 “ according to the articles of regulation; and to note what extra-  
 “ vagancies they shall disallow;”

“ Which

" Which report was read by the clerk entire. And the first resolution being again read, the same was agreed to by the House. Then the other resolution being likewise read a second time, was, with some amendments, agreed to by the House, and ordered as follows :

" ' Ordered, that the said Lords of Session be and are hereby directed to tax and ascertain the petitioner's costs and expences, by considering the particulars of such costs and expences, article by article.' "

Mrs. Lyon presented a second petition to the House, complaining, <sup>1719.</sup>  
" That the Lords of Session in Scotland have not taxed the peti- <sup>Dec. 19.</sup>  
" tioner's costs and expences agreeably to the order and judgment  
" of this House, of the 22d August 1715, and the order of the  
" 11th February 1717, and praying relief ;"—which was referred  
to a committee.

The Earl of Clarendon reported from the Lords committees : <sup>1719-20.</sup>  
" That the committee have accordingly considered the said peti- <sup>Feb. 9.</sup>  
" tion, and heard counsel thereupon, as well on behalf of the  
" Earl of Aboyne as for the petitioner, and think proper to ac-  
" quaint your lordships with the matter, as it appeared before  
" them :"

(Here are recited the judgment, 20th August 1715, and proceedings thereupon, before the Court of Session ; Mrs. Lyon's petition of 21st December 1717, and the resolution and order of the House, 11th February 1717-18.) " Which (last-mentioned)  
" order being likewise by the petitioner soon after exhibited to  
" the said Lords, and therewith a bill, amounting to 785*l.* the  
" said lords did not only reject the whole charges she had been at  
" before them, on their ordering her the said 100*l.* in the name  
" of costs, which amounted to about 23*l.* 15*s.* sterling ; but also  
" the charges she had been at in her complaint to the House  
" thereupon, which amounted to 50*l.* ; and gave for reason,  
" ' That such costs fell more properly to be taxed by your Lord-  
" ship's.' And in taxing the petitioner's said bill, the said lords  
" disallowed all the articles therein charged for counsel's fees, in  
" drawing answers to the said Earl's reclaiming bills or petitions,  
" amounting to upwards of 100*l.* sterling : though she was obliged  
" by the interlocutors of the said Lords of Session to give in all  
" the said answers to such reclaiming bills or petitions, and to  
" have the same drawn and signed by counsel ; or in default  
" thereof, she must have lost the whole effect of her suit : And  
" the committee upon this occasion think proper to take notice,  
" that the said lords did, notwithstanding, allow the petitioner  
" her charges for printing the said answers, and the fees paid to  
" the clerk in putting in the same : The committee further ac-  
" quaint your lordships, that the Lords of Session likewise refused  
" to allow the petitioner what she was from time to time obliged  
" to pay for inrolling her cause before the Lord Ordinary, money  
" to clerks' servants, extractor's servants, and to her agent or soli-  
" citor, and several other expences : But the counsel for the said  
" Earl insisting that such particulars of costs are not usually  
" allowed

" allowed by the Lords of Session, the committee think proper  
 " further to acquaint your lordships, that there was produced  
 " before them, on the part of the petitioner, a declaration or  
 " certificate under the hands of several advocates, ancient prac-  
 " tisers before the Lords of Session, testifying, ' That the dues  
 " claimed in the account of expences given in by her in the  
 " taxing of her costs, as paid to the Lords of Session's principal  
 " servants, to advocate's second servants, to clerks and ex-  
 " tractors servants, and to agents, for their agenting processes  
 " and pleas of law, were, many years before the petitioner's  
 " process, in use to be paid by all persons whatsoever, whether  
 " pursuers or defenders before the said Lords; inasmuch  
 " that no person now can, nor could for many years past,  
 " prosecute or defend any suit at law, without paying the said  
 " dues to the above-mentioned persons: And that the lawyers  
 " in that part of Great Britain do receive their consultation  
 " money for drawing answers to petitions, ordained to be an-  
 " swered by the said Lords; which are the same with the above-  
 " mentioned reclaiming bills, as well as for drawing the said  
 " petitions; and generally for all papers signed by lawyers pre-  
 " sented to the said lords?

" The committee think fit also to acquaint your lordships,  
 " that they observed a distinction made by the Lords of Session,  
 " that the former order of this House directed only their taxing  
 " such costs and expences as preceded the petitioner's said appeal;  
 " though your committee, upon their enquiry, observed the said  
 " lords have allowed her several *Items* of costs since the determi-  
 " nation of this House on hearing the same, particularly upon  
 " the petitioner's application to the said lords, pursuant to your  
 " lordships' last order, directing them to tax her costs, article by  
 " article:

" The committee, before they conclude, likewise think it  
 " proper to inform your lordships, that though the petitioner's  
 " bill of costs before-mentioned, given in to the Lords of Session,  
 " amounted to 785*l.*; yet the said lords, by disallowing or reducing  
 " divers articles therein contained, have taxed the same at a  
 " sum under 300*l.* which is in no sort a compensation to the peti-  
 " tioner for her costs; in regard it was alleged, that though the  
 " was allowed her whole bill, yet the sum would fall much  
 " short of the real costs, which the aforementioned suits and  
 " processes have necessarily occasioned her.

" And the committee conceiving this to be a matter wherein  
 " the honour and judicature of this House is very nearly con-  
 " cerned, they declined coming to any opinion; but humbly  
 " leave the same to your lordship's consideration."

" Which being read by the clerk intire, ' It is ordered, that  
 " the said report be taken into further consideration on this day  
 " fortnight; and the lords to be summoned.' "

The said report being again read by the clerk, and debate there-  
 upon, " It is ordered, that the said report be referred back to the  
 " same committee, to consider what further sums should be allowed

" the

" the petitioner for her costs; and to report the same to the House."

The Earl of Clarendon reported back from the Lords committee- Feb. 26.  
tees, " That an attested copy of the petitioner's bill of costs, which was by her exhibited to the Lords of Session in Scotland, was laid before the committee, who in the first place proceeded to consider the nature of such costs therein as were by the said Lords of Session disallowed; and in such consideration were attended by an ancient practiser in causes before the Lords of Session; and having heard him, upon oath, as to the ordinary allowances made for the several articles in the petitioner's said bill so disallowed as aforesaid, and particularly considered the same are of opinion, that most of them ought to have been allowed; and therefore, having caused such of the said articles to be cast up, they find the sum total thereof amounts to 186*l.* 4*s.* 4½*d.* :

" The committee also, upon their enquiry into the other disallowances of the said Lords of Session of the petitioner's costs and expences, were informed that the said lords wholly disallowed all th: costs, charges, and expences she had been at upon her last application to this House, when she was obliged to complain that the House of Lords had not taxed her her costs, pursuant to your lordships order, on hearing her appeal; which costs upon that application, as she alleged and offered to make oath, amount to 50*l.* and upwards, exclusive of the whole incident charges and damages she had been put to in prosecuting her several suits for thirteen years past; but the said Lords of Session, on their refusal, gave for reason, that the charges of the said application fell more properly to be taxed by this House :

" The committee were likewise informed, that the costs and charges which the petitioner has necessarily been already put to upon her present application to your lordships, and the further charges which will unavoidably be incurred before she can reap any advantage thereby, will not be less, than the expences which her said former application occasioned, amounting as is above mentioned to upwards of 50*l.*

" The committee, upon this whole matter, think it further necessary to acquaint your lordships, that the costs taxed upon the petitioner's bill, by the said Lords of Session, amount to 295*l.* besides her charges of extracting their decree, which they have also allowed, though not ascertained; and which the committee were informed by the same ancient practiser will amount to upwards of 30*l.*; that the costs disallowed by them, which the committee conceive should have been allowed, amount to 186*l.* 4*s.* 4½*d.* which, with the costs of the said two applications to this House, amounting to 100*l.* make together in the whole the sum of 611*l.* 4*s.* 4½*d.*

" Which being read by the clerk intire, ' It is ordered, that the said report be taken into further consideration on Monday next, and the lords to be summoned.' "

M

" The

1719-20.  
March 1.

“ The said report being again read by the clerk and agreed to,  
“ the following order was made :

“ It is ordered by the lords spiritual and temporal in parliament  
“ assembled, that the said Earl of Aboyne, his tutors and cura-  
“ tors do forthwith make payment to the said Katherine Lyon of  
“ the sum of 611*l.* 4*s.* 4½*d.* for her costs and expences in the seve-  
“ ral suits and processses mentioned or referred to in her said ap-  
“ peal, and in respect of further costs since incurred, upon her  
“ several applications for obtaining relief upon the matters com-  
“ plained of in her said petition.”

In the Dictionary of Decisions, vol. i. p. 439. *Implied Discharge and Renunciation*, many decisions are stated for the doctrine, that after extracting a decret expences are not to be allowed : but that doctrine in the present appeal was reversed.

Cafe 38. John Goddard, Gentleman, - - *Appellant ;*  
Fountain- Sir John Swinton, Baronet, - - *Respondent.*  
hall,  
23 July  
1709.

30th August 1715.

*Foreign Decree* — The effect of a judgment of the Court of King's Bench, when founded upon by a pursuer against a defender in the Court of Session.

*Homologation*. — The defender had in England been surrendered by his bail, who were discharged ; and the defender executed an instrument, importing that the judgment should not be released by such discharge ; this instrument found not to homologate the judgment.

THE appellant's mother Ursula, as administratrix of his late father Robert Goddard, deceased, in October 1700 commenced an action against the respondent before the Court of Session for payment to her of the sum of 404*l.*, with interest since the year 1680 ; stating the circumstances of the case to be :

That in 1675, the respondent being at London and dealing as a merchant, he and the said Robert Goddard and nine other persons executed articles of agreement under their hands and seals to become partners in a ship called *The John and Thomas of London*, and her cargo, to the value of 3800*l.* on a voyage to Guinea ; and all the parties, under a penalty of 6000*l.*, covenanted to account with and pay each other for such proceeds of the cargo as should come to each partner's hands :

That by the said articles Mr. Goddard was declared to have four parts of 32 in the said ship and cargo ; and the ship, proving successful in her voyage, returned to the port of London in 1677, and the disposal of the cargo was committed to the respondent, as cashier and agent for the partnership : he received thereon to the value of 5403*l.* 9*s.* 4*d.*, whereof 675*l.* 8*s.* 8*d.* was Mr. Goddard's share ; and the respondent having paid him 285*l.* 8*s.* 8*d.*, there remained due to him 390*l.* :

That

That after Mr. Goddard's death, the said Ursula, his widow and administratrix, brought an action of covenant upon the said articles, in the Court of King's Bench against the respondent, for the said whole sum of 675*l.* 8*s.* 8*d.* received by him, setting forth in her declaration the covenant in the articles, and alleging in fact, that the respondent had been appointed cashier of the said cargo, and had received out of the same 5403*l.* 9*s.* 4*d.*, of which the said sum of 675*l.* 8*s.* 8*d.* was her late husband's share :

That the respondent demurred generally to the said declaration, thereby admitting the facts stated to be true; and after several adjournments the demurrer upon argument being over-ruled, a writ of inquiry was issued, which was executed; and the jury upon stating the account found the respondent indebted to the deceased 390*l.*, which sum they assessed for damages to the administratrix; and thereupon, in Hilary term 1680, judgment was signed and entered up for her against the respondent for the said 390*l.* and for 14*l.* costs, in all 404*l.* sterling :

That the respondent being unable to satisfy the said debt, prevailed on Mrs. Goddard not only to forbear suing to execution, but also to discharge his bail; and accordingly, on the 28th of February 1680, she, by an instrument under her hand and seal, (which was drawn and prepared by the respondent and attested by himself,) taking notice of his inability to pay the debt so recovered against him, declared that his bail should stand discharged, and that they might be at liberty to vacate their recognizance: and the respondent by a writing indorsed on this instrument, and signed by him and one of the bail, declared "that no clause or expression therein mentioned is intended, or shall be construed or meant to intend the release or discharge of the judgment within mentioned, obtained by the within Ursula Goddard against the said John Swinton; or is it intended or meant thereby, in any ways or means howsoever or whatsoever, to preclude the said Ursula Goddard from obtaining any advantage upon the said judgment against the said John Swinton for the recovery of her debt due from the said John Swinton to the said Ursula Goddard:"

That the respondent being restored to his estate in Scotland (upon the prospect of which Mrs. Goddard had given him forbearance), but refusing to make payment of what was owing by him, the said Ursula's action concluded, that the said judgment of the Court of King's Bench might have the authority of the Court of Session interposed thereto, and that Sir John might be decreed to pay the said 404*l.* sterling with interest, and that all execution might be directed thereon. And in this action, the said Ursula produced (what she said was) an original of the articles of agreement, with the English judgment, and instrument executed upon the discharge of the respondent's bail.

Before any determination in this matter, the said Ursula died; and the appellant having administered to her, and also confirmed the said debt in Scotland, revived the action against the respondent in 1704. Various steps were afterwards taken in this ac-

tion, and in February 1708 it was remitted to the Lord Ordinary to make a state thereof: the points then in question before his lordship were,

1st, Whether the judgment obtained in England should be taken as *res judicata*, and should be admitted as a sufficient proof of this debt without any other evidence.

2d, Whether the instrument for discharging the respondent's bail, and his declaration indorsed upon it, should be deemed an homologation of the judgment; and

3d, Whether annual-rent ought to be paid for this debt *vel ex pacto vel ex lege*. This last point did not come under the appeal.

The Court, upon a report by the Lord Ordinary, on the 13th of July 1709, "Found that the aforesaid declaration doth homologate and exclude all objections against the judgment;" to which they adhered on the 26th and 28th of July. But the respondent having presented another petition, in which he contended that former decisions of the Court were in his favour, and stated that the appellant's father had never signed the articles of copartnership; the Court allowed a re-hearing, and afterwards, in June 1710, "found that the declaration granted by the respondent did not homologate and exclude objections against the judgment;" to which they adhered on the 13th of February 1711. And on the 3d of December 1713, the Court "sustained the judgment of the Court of King's Bench, the appellant instructing that Goddard was copartner, and that Sir John was cashier and had intromission to make him liable for Goddard's proportion."

*Sic in Journ.*  
Entered,  
2 June  
1713.

The appeal was brought from "several interlocutors of the Lords of Council and Session of the day of June 1710, the 13th of February 1711, and 3d of December 1713."

#### *Heads of the Appellant's Argument.*

The judgment ought to be allowed to be a sufficient proof of the matters now directed to be proved over again; and the rather since it appears from the judgment, that the respondent by demurring generally had admitted and confessed these very facts, *inter alia*, to be as they are set forth in the declaration, viz. That the appellant's father was co-partner, and that the respondent was cashier of the said cargo, and had received the proceeds of it: besides which, by the articles of copartnership produced and read at all the hearings, and admitted by the respondent to be his act and deed, it is manifest, that the appellant's father was copartner.

The instrument for discharging the respondent's bail, which is attested as a witness by himself, wherein he declared, that he was not then able to pay the said debt; and his indorsement upon the same, whereby he agrees, that nothing contained in that instrument should release the said judgment or preclude Mrs. Goddard from recovering the debt due to her thereon, are such acknowledgments of the said debt, and such an establishment of the judgment, and of the several material facts in the declaration



## CASES ON APPEAL FROM SCOTLAND.

mentioned, on which the said judgment is founded, as amount to a perfect homologation or confirmation of the same.

### *Heads of the Respondent's Argument.*

The said declaration signed by the respondent was not a formal or direct covenant or deed of consent, nor can import a homologation of the judgment of the King's Bench; because it was not made freely and voluntarily, but *metu carceris*, the respondent being then surrendered by his bail, as appears from the express words of the release, and being in the power of the said Ursula Goddard and ready to be put in gaol; and by the constant practice of the law of Scotland, agreeably to the principles of the civil law, a deed made even directly confirming any judgment or covenant in such a case, could have been of no force, unless the justice and equity of such judgment otherwise appeared to the Court. It was upon representation of former decisions and a full argument on that subject, that the Court of Session were brought to alter their first sentiments, for "*nihil consensui tam contrarium est quam vis atque metus, quem comprobare contra bonos mores est.*" Ulpianus Lex, 116. de Reg. Juris."

As this deed was involuntary, so it was not at all to the purpose that the appellant contends for: The respondent's bail having surrendered, or at least agreed to surrender him, they insisted to be released, and this the said Ursula agreed to, in consideration of the payment of 5 shillings: but she being anxious to reserve to herself the benefit of the said judgment against the respondent, she obliged him to declare, that the release of his bail was not intended to discharge the judgment or any advantage against the respondent for payment of the debt. The point in view was not to confirm the judgment, but to declare what was the intent of the release.

The validity and equity of this judgment depends upon this point, amongst others, viz. whether the said Robert Goddard was a copartner with the respondent, and others, and this point the respondent disputes, and says, that Robert Goddard never signed these articles: if this be the case, though a party may by homologation supply any defect of a deed which depends upon himself only, yet no deed of the respondent's could have made Robert Goddard a partner in the whole stock without consent of the whole partners; and it was upon this ground, among others, that the Court pronounced the interlocutor of the 13th of February 1711.

There is no law nor precedent, binding or obliging, the sovereign court of any country to put in execution the decree or sentence of any court of another country; and in the year 1680, when the judgment of the King's Bench was given, as well as in the year 1700, when the action was commenced before the Court of Session, the kingdom of Scotland was separate from England as much as any other kingdom of Christendom. Even now after the union, it remains still equally distinct in all things that concern the laws of civil right, and the limits and extent of jurisdiction.

tion by express stipulation; the governing maxims, therefore, *par in parem non habet imperium vel potestatem*, and *extra territorium jus dicenti impune non paretur* must take place as much as ever, and the judgment of the King's Bench can no more take place in Scotland, than those of the Court of Session can take place in England.

But even supposing the judgment of the King's Bench to have the same effect and force out of England, that the appellant contends it ought to have, yet the interlocutor of the 3d December 1713 is most just; for the appellant did not insist only upon his judgment, but likewise upon a counterpart of the articles of copartnership which he produced. The whole cause was thereby by him submitted to the Court; and if the respondent had any thing to object to the said Goddard's being a partner, the Court ought to have received it. The appellant, even oftener than once, prayed for leave to make further probation, and insisted that his father was copartner, and that the respondent was cashier and received his effects.

It makes no difference, that the articles were in relation to English business, and executed in England by persons residing there; because, the objection in this case arises from the separation of jurisdiction, which is *juris publici*: And the only question is, whether the judgment of the King's Bench does bind the Court of Session to proceed, without enquiring into the cause, against a person and his property in Scotland, which are under the direction and protection of the law and jurisdiction obtaining there.

Judgment,  
30 August  
1715.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed this House, and that the interlocutors complained of in the said appeal be affirmed.*

For Appellant, Rob. Raymond. Sam. Mead.  
For Respondent, David Dalrymple. J. Jekyll.

Robert Middleton, Rector of St. Mary's in  
Colchester, - - - - - *Appellant*;  
Lieutenant-Colonel John Balfour, - - - *Respondent*.

Case 39.

2d September 1715.

*Heritable and Moveable.*—A father in 1641, upon his eldest son's marriage, settled an estate upon him and the heirs thereof, reserving a power to burden: the son was infertile, and half the marriage portion paid to the father; but the wife dying without issue, within year and day, the father granted a bond to the son to employ same for his benefit, or to restrict his power of burdening *pro tanto*; the eldest son also dying, the father settled the estate upon the second son, who, after the father's death, granted heritable securities with infestment to creditors thereon in 1666, upon which appraisings were led in 1670. His son having taken up the succession as heir to his uncle, instead of his father (the second son); at the instance of creditors, the contract of marriage and infestment were reduced by the Court of Session, but with a clause, that the half of the marriage-portion which had been paid should be a real burden upon the estate: this half was afterwards confirmed by the executor and adjudication taken in 1680. In a competition between the person having right to the heritable bonds and infestments in 1666, with appraisings thereon in 1670, and the person having right to the half of the marriage-portion, the Court having preferred the latter, the judgment is reversed.

**B**y contract of marriage in April 1641, between Sir Robert Arnot, son of Sir James Arnot of Fairnie, and Elizabeth Bruce, daughter to George Bruce of Carnock, Sir James Arnot, in consideration of the said marriage between his son Sir Robert and the said Elizabeth Bruce, and of 16,000 merks to be paid by the said Bruce of Carnock, conveyed all his estate and lands of Fairnie to his son Sir Robert, and the children of the marriage by way of entail, reserving his own life-rent in part thereof, and a power of burdening the said estate with 16,000*l.* Scots, and upon this contract an instrument of sasine was taken. Mr. Bruce of Carnock, soon after the marriage, took effect, paid the sum of 8000 merks, half of the said 16,000 merks, to Sir James Arnot, the father: But Elizabeth Bruce died within year and day of her marriage without a living child, and the other half was not paid. Upon an agreement in January 1641-2, relative to this matter, between Sir James Arnot and Mr. Bruce, Sir James granted bond to Mr. Bruce of Carnock, that he would either employ the said 8000 merks, for his, Sir Robert's benefit, or diminish the power he had of burdening the estate *pro tanto*.

Sir Robert Arnot died soon after, and his father re-entered to the enjoyment of the estate; and afterwards executed a settlement thereof to himself in life-rent, and after his decease to James Arnot, his eldest son then living in fee.

Sir James Arnot and James his son having afterwards borrowed from Henry Wemyss, the appellant's grandfather, the sum of 4000 merk, did, by their bond dated 8th February 1650, bind themselves, their heirs, &c. to pay the same with interest at Can-

dlemas 1651 to the said Henry Wemyss, and in case of his death, to Isabel Wemyss and Margaret Wemyss, his daughters, equally between them. Sir James Arnot having died before the said debt, or any part thereof, was paid, and the said Henry Wemyss being also dead, James Arnot the son, on the 24th of May 1666, granted two heritable bonds for securing payment thereof, one of them to John Middleton (the appellant's father, who had married one of Henry Wemyss's daughters), and Margaret his wife, and the other to the said Isabel Wemyss. These bonds severally bore, that the parties, at the earnest request of the said James Arnot, were willing to supersede payment of their respective halves of the said debt and interest, each half then amounting to 2108 merks, and therefore the said James Arnot granted to each of the parties an annual-rent of 130 merks 10 shillings and 8d. Scots to be issuing and payable out of all his said estate at Lammas and Candlemas by equal portions, with a penalty in case of non-payment. Upon these two bonds the parties were severally infest. On the 13th of September 1670, Isabel Wemyss assigned to the appellant's father the said heritable bond in her favour: And no part of the said annual-rent being paid, the appellant's father and mother in their own right, and the appellant's father as assignee of the said Isabel Wemyss, on the 25th of April 1671, obtained a decree of apprising against the said estate for the arrears of both the said annual rents then amounting to 1508 merks.

The said James Arnot died, leaving the estate much incumbered with debts, and was succeeded by his son James. This James, for the purpose of getting the estate free of these debts, served himself heir in special to Sir Robert, his uncle, who had been infest in the estate in virtue of the marriage-contract. And thereupon the Lord Burleigh, and other creditors of James the son, brought an action before the Court of Session, to have the said settlement of the estate upon Sir Robert by the marriage-contract reduced and voided upon this reason, that the estate being conveyed to Sir Robert by Sir James his father *intuitu matrimonii*, and that marriage being dissolved within year and day without a living child thereof, the right fell, and the estate returned to the grantor. James the grandson opposed this action; and it was contended, that if the estate returned to Sir James the grandfather, it ought to be with the burden of 8000 merks, part of Sir Robert's Lady's marriage portion, and which Sir James had obliged himself to employ for Sir Robert. The Court, in 1678, reduced the marriage-contract and conveyance of the estate to Sir Robert, with the burden of the sum of 8000 merks to be paid to them who should be found to have the best right thereto; declaring the foresaid sum of 8000 merks to be a real burden affecting the lands, and preferable to any debt or burden posterior to Sir James's bond; and that the representatives of the said Sir Robert Arnot might adjudge the lands, and were preferable to all other creditors of the said Sir James Arnot the father, or James the-son posterior to the bond.

George Arnot, third son of the said Sir James, afterwards confirmed himself executor to his eldest brother Sir Robert; and  
in

in a competition between him and James Arnot the grandson and heir at law, (Sir Robert's nephew), the Court of Session, in 1680, decreed the said sum of 8000 merks to belong to the executor; And on the 11th of January 1683, George Arnot obtained decree of adjudication of the said lands as a security for the said sum of 8000 merks.

This debt of 8000 merks, and securities of the same, were afterwards acquired by the Lord Burleigh (who before had several apprisings and claims upon the estate); and he accordingly entered to the possession of the estate. On the 10th of December 1684, Lord Burleigh conveyed all the apprisings, heritable securities, adjudications and other securities he had upon the estate to the respondent who entered to and possessed the estate by virtue thereof.

The father of the appellant having died, he became entitled to the said two annual rents which had been granted to his father and mother, and to Isabel Wemyss his aunt, which, with the arrears thereof, amounted to a great sum of money: And in 1712, near 35 years since the Lord Burleigh and the respondent had entered to the possession of the said estate, he brought his action against the respondent before the Court of Session, in order to have the possession of the estate granted to him for satisfaction of his said debts, contending that the claims of the respondent were fully satisfied by receipt of the rents. And the respondent brought an action of ranking and sale against the appellant and the other creditors upon the estate, that their respective claims might be examined, the estate brought to a sale, and the price applied towards discharging the prior incumbrances.

These actions came to be heard together, and it came to be a question (which is the subject of the present appeal), whether the said debt of 8000 merks, to which the respondent had acquired right, and which by decree of the Court of Session in 1678 was found to be a real burden upon the said estate, and preferable to all debts contracted by James the son, and for which an adjudication was obtained in 1683; or the debt claimed by the appellant, was preferable upon the estate. The appellant made an objection, that though the respondent contended that this debt of 8000 merks was a real one, yet his only title to it was through an executor. Parties were heard before the Lord Ordinary, and his lordship, on the 5th of February 1714, "Repelled the appellant's objection against the respondent's title to the bond and sum therein; and found that George Arnot was *habili modo* vested in the right thereof, the said decree of reduction bearing that sum to be only a real burden upon the subject, so that as to the creditor it continued moveable: And found, that notwithstanding the adjudication at George Arnot's instance in 1683 was posterior to the appellant's apprising, yet the same must be drawn back *ad suam causam*, viz. the bond granted by Sir James Arnot to Bruce of Carnock for the behoof of Sir Robert Arnot, his son-in-law, of the 8000 merks advanced by Carnock to the said Sir James as a part of the portion with his daughter, in the terms of the contract of marriage: Therefore and in regard

“ regard the decret of reduction of Sir Robert’s contract of marriage, and infestment bears to be with an express burden and condition of paying the sum contained in the said bond, which must be understood *cum omni causa*, preferred the respondent by virtue of the said adjudication, for the said principal sum of 8000 merks, and interest thereof, since leading of the said adjudication and in time coming upon the lands therein contained, and price thereof in case of a sale, and that prior to the apprising founded on by the appellant.” The appellant gave in a representation, and after answers for the respondent, the Lord Ordinary, on the 19th of February 1714, “ adhered to the said former interlocutor.” The appellant afterwards reclaimed, and the respondent having answered the Court on the 11th of June 1714, “ adhered to the Lord Ordinary’s interlocutors as to the 8000 merks principal money, but remitted to the Lord Ordinary to have parties procurators as to the interest since the decret of adjudication led for the said sum, and to determine or report as he should see just.” A second reclaiming petition was given in for the appellant, and answers for the respondent, the Court, on the 30th of June 1714, “ adhered to their former interlocutor and refused the desire of the petition.” The appeal was brought from “ the interlocutory sentences, or decrees of the Lord Polwarth the Ordinary in the cause of the 5th and 19th days of February 1714, and from so much of the interlocutors of the Lords of Session of the 11th and 30th days of June 1714, as affirms these interlocutors of the 5th and 19th of February.”

Entered,  
31 June  
1715

#### *Heads of the Appellant’s Argument.*

Though the bond founded on by the respondent was prior in date to the heritable bonds on which the appellant claims; yet the said bond being only personal, it could not, unless apprising had been obtained prior to the date of the said heritable bonds, preclude the appellant from the enjoyment of the said annual-rents, which, by the heritable bonds and infestments thereon, were real rights immediately affecting the said estate. Even if they had not been real rights, affecting the said estate, yet the respondent’s adjudication in 1683, being more than ten years posterior to the decree of apprisings obtained by the appellant’s father in 1671, it could not bar the appellant’s right, for by the unquestionable law of Scotland such apprisings after 10 years give an absolute right to the estate so apprised to the exclusion of all subsequent rights.

The bond granted by the said Sir James Arnot for the 8000 merks for the use of Sir Robert his son, when his marriage happened to be dissolved, was but a personal obligation: It was granted at the desire of Bruce of Carnock to whom the money ought to have been repaid, but he being willing to give it to his son-in-law took it for his use; and this bond did not affect the estate till the adjudication was had thereon in 1683. Before this time the heritable bonds in the person of the appellant had been granted, and  
infest-

infestment taken thereon, and the appellant's father had used his real execution by apprising against the same. That the bond for 8000 merks was merely personal, appears further from the assignment thereof by George Arnot the executor of Sir Robert, under which the respondent claims: For if it had been a real right to affect the said estate, it would have belonged to Sir Robert's heir and not to his executor, and of consequence the said George Arnot could not have had a right thereto, nor made a good grant thereof.

With regard to the decree of the Court of Session in 1678, nothing therein could alter the nature of the thing so as to make that bond a *real*, which was only a *personal right*; nor could this decree affect the appellant, since neither his father nor he were parties called or appearing thereto. Nor ought this decree to be construed otherwise, than that the said estate would be subject to this debt, after the appellant's and other prior incumbrances were paid. But, however, nothing in the decree, which was posterior both to the heritable bonds and to the decree of apprising under which the appellant claims, and made between other parties, can prejudice the appellant's right; and his father had great reason to think himself safe, when no real incumbrance appeared on the said estate from the *public records*, which are a great security by the law of Scotland, and would be wholly frustrated if in this point the respondent should prevail.

#### *Heads of the Respondent's Argument.*

The obligation for the payment of the 8000 merks granted by Sir James the grandfather, did never affect or charge the fee in Sir Robert's person; but upon Sir Robert's death it affected and charged the reversion of the fee to the grandfather, and those claiming under him, so that they could not enjoy the estate, but charged with this sum.

Upon the dissolution of the marriage, all things behoved to remain as securities and pledges for one another, till there was a full performance by both parties of the marriage-contract; and if it was a real charge upon the estate it must be preferred to the appellant's, and all other debts contracted afterwards.

The rule is not universal, that all real rights are to be found upon record. For there are several real rights constituted by infestments, where the conditions are not expressly mentioned: For, a wife infest for a jointure, if the marriage dissolve within year and day, will retain her jointure till her portion be repaid, though there be no such quality in the infestment: Excambion is likewise a real burden without infestment, which indeed comes very near the present case. Nor can this be any uncertainty to creditors because not recorded; for the infestment to Sir Robert was recorded, and no body would purchase the estate or lend money upon it, without knowing how Sir Robert was divested of that estate, whereby they would know that this debt was a charge upon the same.

The appellant made objection, that if this were a real burden upon the estate, it could not go to the executor. But the interest of all real debts goes to executors, and so do annuities, and yet they are real burdens and really secured: And the Court of Session in 1680, after finding this debt of 8000 merks to be a real burden, decreed the right thereof to the executor; and it is *jur tertii* to the appellant to make this objection, since the heir does not question the conveyance.

This debt being by the Court of Session in 1678 found to be a real debt upon the estate, preferable to all the debts of James the son, Lord Burleigh, who was a considerable creditor, was necessarily obliged, in order to secure himself, to purchase this debt. It would be to render the decrees of the Court of Session very precarious (which are at present looked upon to be the best title for a purchase) if they were to be overturned, after almost forty years possession under them.

Journal,  
2 September  
1715.

After hearing counsel, *It is ordered and adjudged that the said interlocutors of the 5th and 19th of February 1714, and so much of the said interlocutors of the 11th and 30th of June 1714, as affirms those interlocutors of the 5th and 19th of February be reversed; and that the decree of apprising of the 25th of April 1671, obtained by the appellant's father, and the appellant's demand in respect of the annuities granted by the deeds of the 24th of May 1666, ought to have preference of and be satisfied out of the estate in question before the 8000 merks claimed by the respondent.*

For Appellant, *Spencer Cowper, Rob. Raymond.*  
For Respondent, *J. Jekyll. Will. Hamilton.*

**Case 40.**

Fountain-  
hall,  
27 March  
1709.  
Forbes,  
24 July  
1713.

James Hamilton of Dalziel Esq. - - - *Appellant;*  
The Principal, Masters, and Professors of  
the University of Glasgow, - - - *Respondents.*

9th May 1716.

*Superior and Vassal.*—*Act of Parliament* 1469, c. 36.—An university having acquired right to an adjudication of lands, held in ward, for a debt due to them, the Court found that the superior must enter the university, or pay the debt to the extent of the value of the lands: but upon appeal the judgment is reversed; and it is ordered, that the superior should admit such proper person for vassal as the university should nominate.

*Bona fide Possession.*—The superior, notwithstanding the reversal, is obliged to account for the rents since the charter was offered to him by the university, he having deduction of his casualties as if the old vassal then entered.

*Costs and Expenses.*—Expences of the Court below, and 30*l.* costs of appeal, given to the appellant.

ON the 9th of June 1687, Elizabeth Herbertson, widow, obtained a decret of adjudication of the lands of Shields and Burngrains, belonging to her creditor Mungo Nisbet, who held these lands of the appellant in Ward holding. Mrs. Herbertson  
after.



afterwards gave the appellant a charge to enter her as his vassal, but she never did enter in that capacity, and the appellant, in December 1696, obtained a decree of declarator of non-entry against her. In May 1697, Mrs. Herbertson being debtor to the respondents in certain sums of money, for their payment and satisfaction assigned over to them her said debt due by Mungo Nibet, and also conveyed to them the said adjudication obtained by her over the lands of Shields and Burngrains.

In July following the respondents tendered to the appellant as superior a year's rent and a charter to be executed by him, to admit the respondents as his vassals in the premises; but the appellant refused to admit the respondents, alleging that he was not obliged to admit an university as his vassals, because he would thereby be deprived of his casualties of entry, non-entry, and other casualties incident to ward-holding.

The respondents in 1707 brought an action before the Court of Session to compel the appellant to receive them as his vassals; and the cause being heard before the Lord Ordinary, his lordship, on the 25th of March 1707, "found that the appellant was not "obliged to enter the respondents as his vassals."

This action was not further proceeded in till 1713, and at a hearing of the cause on the 16th of February that year, the respondents insisted upon the act of parliament 1469. c. 36. that the appellant was obliged either to enter the respondents as his vassals, or to pay the debt due to them. The Court, on the 24th of July 1713, "found that the appellant the superior must either enter "the university of Glasgow, or pay the debt due to them to the "value of the lands adjudged, as the said value should be determined by the Lords upon a probation thereof; and found that "the said respondents must transfer their right and debt to him "upon his paying the value of the said lands, with absolute warranty for the sum they received, reserving always their right "to them against the common debtor, in so far as they should "not be satisfied by the appellant in regard the debt due to the "respondents was more than the value of the lands, and found "that the appellant must be accountable for his intromissions with "the rents of the said lands, or interest of the value thereof, in "his option from their offer of a charter and year's rent to him, "and remitted it to the Lord Ordinary in the cause to call and "hear the parties, procurators, and apply the interlocutor, and "determine or report."

Before the Lord Ordinary the appellant made several objections to the offer of the charter made by the respondents to him; and his lordship, on the 28th of the said month of July, "found the "appellant accountable for the rents or interest of the value of "the lands from July 1697, the time the charter was offered to "him," and granted commission to both parties to examine witnesses as to the value of the premises.

The appellant presented a reclaiming petition to the Court, complaining particularly of that part of the interlocutor obliging him to account for the profits since he was in possession, by virtue of

of a decret of non-entry, and contending that he was a bona fide possessor till the university should obtain judgment that the appellant was obliged to receive them as his vassals; and he likewise made some objections to the charter offered him by the respondents. (a) After answers for the respondents, the Court, on the 31st July 1713, "adhered to their former interlocutor, and refused the desire of the said petition, reserving to the appellant his objections against the respondents' charter offered to him." The appellant presented another reclaiming petition against these interlocutors, and praying that his objections against the charge given him by the respondents to receive them as his vassals, might likewise be reserved to him. After answers, the Court, on the 18th of November 1713, "adhered to their former and the said Lord Ordinary's interlocutors, and refused the desire of the petition." The appellant protested for remeid of law against the interlocutors already pronounced; but his appeal was not entered in the House of Lords till other posterior interlocutors were pronounced.

A proof was afterwards made of the rental and value of the said lands; and after considering the proof, the Court, on the 9th of July 1715, "found that the said lands held ward of the appellant, and that the same were worth 16 years purchase; and that the value and price of the said lands extended after deduction of the teind to 1744*l.* 14*s.* 4*d.* Scots money; and found that the appellant ought to make his election whether or not he would accept of the said lands at the value and price aforesaid, (the university of Glasgow transferring their right to him with absolute warrandice for the said price and value), and pay to the said university the said price, or enter and receive the said university as his vassal upon their adjudication, upon payment to him of a year's rent of the said lands."

The appellant (reserving a liberty of appealing) by his counsel made his election to purchase the lands; and thereupon the Court (b) "decerned the appellant to pay to the respondents 1744*l.* 14*s.* 4*d.* Scots, with interest, from the 15th of July 1697, the date of the offer of the charter, the respondents transmitting their right to the appellant." The appellant petitioned against this interlocutor, as being thereby deprived of an opportunity of making his objections against the charter offered to him in terms of the interlocutor 31st July 1713; and he stated that though he had petitioned against the other parts of that interlocutor, and insisted that he might be at liberty to except to the charge given him to enter the respondents his vassals, as well as to the charter offered to him, which petition the Court, on the 18th of November 1713, had refused and adhered to their former interlocutor; yet so far was that from taking away the reservation, that the interlocutor whereby it was given was affirmed; and the appellant therefore prayed, that he might be heard as to these objections:

(a) It does not appear from the Appeal Cases what these objections were.

(b) No date appears to this; and except it formed part of the interlocutor 9 July 1715, it does not appear to be appealed from.

The Court, on the 28th July 1715, "adhered to their former interlocutor, and refused the desire of the petitioner."

The appeal was brought from "an interlocutor of the Lords of Session of the 24th of July 1713, and from an interlocutor of the Lord Polwarth, Ordinary in the cause, of the 28th of the same month, and from that part of the interlocutor of the Lords of Session of the 31st of the same month affirming the said former interlocutors and refusing the desire of the petitioner's supplication; and likewise from the interlocutors of the said Lords of the 18th of November following, and of the 9th and 28th of July 1715."

Entered,  
11 Aug.  
1715.

*Heads of the Appellant's Argument.*

The lands in question hold ward of the appellant, and he is entitled to all the casualties of such tenure; particularly ward, relief, and marriage, which are part of the appellant's property. It cannot, then, be looked upon but as a very great hardship to deprive him of all these casualties (which were the only consideration for the original grant of the said lands) without his consent; but should the respondents prevail, the appellant must lose all these casualties, since an university or corporation can never marry or be under wardship.

However general the words of the act of parliament be, yet as there never was any instance of a superior's having been compelled to receive an university or corporation for his vassal, yet the purpose of the act, as it is humbly apprehended, can only be intended to compel a superior to receive the creditor as his vassal, supposing he were of the same nature or condition as the former vassal. For it cannot be reasonably thought that the legislature intended to put it in the power of a vassal to alter the tenure, and to deprive and disappoint a superior of his casualties; and yet upon the foundation of this decree it will be in the power of every vassal to assign to a corporation whereby a superior will entirely lose his casualties.

The respondents have an easy and safe way to prevent any prejudice to themselves or being deprived of their just demand as creditors; for they may convey their right to a third person in trust for them, and then the appellant, as superior, will enter him as his vassal. And since, by this method, the respondents may be safe as to their demands, and the appellant still be entitled to his casualties, it would be a great hardship to oblige the appellant to do any thing so much to his prejudice as to forfeit his casualties. Though the appellant should be obliged to receive the respondents as his vassal, yet it is conceived to be unreasonable to make him accountable either for the rents of the lands, or the interest of the value thereof, because the appellant was certainly *bona fide* possessor of these lands; he had decree of declarator of non-entry against those under whom the respondents claim, and the possession thereof decreed to him. He had likewise the Lord Ordinary's interlocutor in his favour when this cause came first to be heard, and if the respondents

respondents suffered any inconvenience, it was their own fault for not commencing and prosecuting their action sooner.

Though the appellants were accountable for profits, that could only be from the offer made of a charter from the respondents; but that not being done in a regular manner, nor according to the forms prescribed for that purpose, that offer must be looked upon as void, and consequently the appellants not chargeable with the profits of the said lands.

*Heads of the Respondents' Argument.*

The words of the act 1469, c. 36. are, "And also the over-lord  
" shall receive the creditour or any uther buyer, tennent till him  
" pay—and to the over-lord a yeire's mail as the land is set for the  
" time, and failzieing thereof, that he take the said land till him-  
" self, and undergang the debtes." This act makes no manner  
of distinction what sort of creditors the superiors must receive;  
whether a body corporate or an individual; so that the law being  
indefinite and general, making no exception, the application must  
be so likewise, especially seeing all corporate bodies, and particu-  
larly universities, who have all the favour the law can allow, may  
purchase and contract debts. But if they cannot secure their debts  
and purchases in the same manner that the law allows to other  
creditors, they would be entirely deprived of the benefit of any  
dealings or improving their stock; because, by the law of Scot-  
land, lands and securities upon lands cannot be effectually con-  
veyed without faine, which the superior must always give in the  
case of adjudications; so that to allow the superior the liberty of  
refusing, is in effect to deny the benefit of real security to incor-  
porated bodies on their debtor's lands. And as to the pretended  
inconveniences that might happen to a superior, by an university's  
being received as a vassal, they are very little to be regarded; for  
although they were such as stated, yet the act of parliament being  
general, it must take place, and inconveniences in certain particu-  
lar cases must always yield to a more universal good: and the  
superiors have got by the law a recompence, which is a full year's  
rent, and which is thought equivalent for the exchange of the  
vassal.

The appellants can sustain no loss by this, for long before the offer  
of a charter, and ever since he has been in possession of all the rents  
and profits of the said estate, and by the interlocutors appealed  
from he is decreed to pay no greater price than 16 years' purchase,  
which is very moderate, and it was the appellants' own particular  
choice, rather to pay that price than to quit the property of these  
lands and retain the superiority only. Besides, it is most reason-  
able that the appellants should be obliged either to be accountable  
for his intrusions, or the value of the lands and interest since  
the said 5th of July 1697, because he received the rents and pro-  
fits *sine titulo*; and his possession was a plain usurpation upon the  
vassal, for the superior is only entitled to the full rents during the  
vassal's wilful non-entry. But ever since the said 5th of July

1697

1697 the vassal has not been wilfully in non-entry, that being the time of the university's offering a charter and a year's rent to the appellant to enter them as his vassals. With this he ought in law to have complied, whereby the lands would have been full; and so they must be held to be as to the appellant, agreeably to the rules of the civil law. "In omnibus causis pro facto accipitur id, in quo per alium moræ fit quo minus fiat." Digest. de reg. juris. 39. And "In jure civili receptum est quotiens per eum, cujus interest, conditionem non implere, fiat, quominus impleatur, perinde haberi, ac si impleta conditio fuisset." Ibid. 161.

Digest. l. 50.  
tit. 17. l. 1.  
Reg. Jur.  
39 & 161.

As to the pretence of the charter's being irregular, that is entirely groundless, the same being in the precise words of the charters granted by the appellant's predecessors of the said lands to the former vassals. And although the appellant made several objections to the said charter so offered by the university, and though these objections were reserved to him to be proved; yet upon the appellant's application to the Court in relation thereto, and the university's answer, these objections were fully cleared, as appears by the interlocutor of the 18th November 1713, as well as by all the subsequent interlocutors made in this cause. The reservation of these objections therefore cannot be construed to entitle the appellant to the property of all the rents and profits of the estate received by him, since these objections have been since over-ruled by what the Court did afterwards.

After hearing counsel, *It is ordered and adjudged, that the several interlocutors complained of in the said appeal be reversed; and it is further ordered and adjudged, that the appellant admit such proper person for tenant as the respondents shall nominate, and that the appellant do account for the profits of the lands of Shields and others mentioned in the said appeal, which he received or might have received without his wilful default, from the time the respondents offered the charter in the year 1697, deducting thereout the year's rent due for such admission and the appellant's costs in the court below, and also 30l. for the appellant's costs of this appeal; and further, that the appellant have allowance for all such casualties as have (been) incurred (if any) supposing Mrs. Herbertson had been admitted vassal in the said lands at the time of the offer of the aforesaid charter in the year 1697, and the said Court of Session is hereby ordered to cause the said account to be taken, and full costs to be assessed sustained by the appellant in the court below.*

Judgment,  
9 May  
1715.

For Appellant, Sam. Mead. Will. Hamilton.  
For Respondent, David Dalrymple. Thomas Lutwyche.

This case is in several respects worthy of particular observation; the judgment here reversed so favourably for the appellant, as to allow him expences of the court below and costs of appeal, is founded on in the Dictionary, vol. 2. p. 408. *Superior and Vassal*; and by Bankton, b. 2. tit. 4. § 11. It appears decisive

of the point, that a superior is not obliged to receive an university adjudger as his vassal.

With regard to the collateral point of law, whether, in the case of an university or corporation dispoinee a superior would be obliged to receive or not, Bankton states, that no decision has been given; and he inclines to think that the act 20 Geo. 2. c. 50. as it contains no exception with regard to universities or corporations, would oblige the superior to receive them. Erskine, however, b. 2. tit. 7. § 7. inclines to the opposite opinion; and indeed the act last mentioned does not appear so strong in favour of the university or corporation dispoinee, as the act 1469, c. 36. is in favour of the adjudger.

A similar decision to that here reversed, is given by Dalrymple, 11 December 1712, Master of Church and Bridge Work of Aberdeen, against the King's College of Aberdeen, where the decision of the Court of Session in the present case is also mentioned.

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Case 41. David Gregory of Kinnairdy, - - Appellant;  
James Anderfon Grazier in Aberdeen, - Respondent.

24th May 1716.

*Donatio inter virum et uxorem.*—During the subsistence of a marriage a wife and her sister, who have an equal right to a bond, convey the same to the husband. He afterwards makes his will, appointing his wife executrix and universal legatee, for behoof of the grandchildren. After the death of the husband, the grant formerly made by her to him was not revocable as a *donatio inter virum et uxorem*.

*Prescription.*—The prescription of 40 years not to be counted, from the date of an assignment of a bond, but from the time of receiving the money thereon.  
*Onerous cause.*—An assignment of a bond, bearing to be for onerous cause, from the circumstances of parties as executrix and trustee, found not to prove the onerous cause of the assignment in a question near 50 years from the date thereof.

*Trust.*—A discharge granted by an executrix to a manager for her under a will, who had a salary, or all his receipts and intromissions, in general terms, was not sufficient to discharge him from the intromission with a bond, which the deceased disposed to the widow, his executrix, for the good of his grandchildren.

*Cyts.*—30l. given against the appellant.

**H**UGH FRASER of Eastertyre, and Thomas Fraser of Strichen, as his cautioner, being indebted by bond in the sum of 1000l. Scots to Patrick Dyvie; the same was afterwards assigned to Dr. William Guild, Principal of the college of Aberdeen. Dr. Guild dying intestate, and without children, his sister Christian was confirmed his executrix, who with her sister Margaret, in August 1661, assigned that bond to Thomas Cushney, the said Christian's husband.

Thomas Cushney by his will and testament, in 1664, appointed his wife Christian his executrix and universal legatrix of all his estate

estate real and personal, in trust for the respondent, and Thomas his brother, the testator's grandchildren by Jean Cushney his only child; ordaining his said wife to give up an inventory of his estate, and to employ the same for the payment of his debts, and the good and welfare of his grandchildren; giving his wife only a life-rent out of his said estate; and he appointed the appellant and two other persons overseers, and ordered his wife and grandchildren to pay 50 merks Scots to each of them yearly for their pains and trouble. This will and testament was also subscribed by Christian the wife of Thomas Cushney and Jean the daughter, in token of their assent thereto. After Cushney's death, the appellant pursuant to the trust and during the widow's lifetime, received the produce and profits of the estate of the deceased, and accounted to her for the same.

In 1666, Christian the widow executed an assignation of the said bond for 1000*l.* Scots due by Fraser of Eastertyre and Fraser of Strichen, the nature and object of which are differently stated by the parties. The appellant mentions, that he being creditor to the said Thomas Cushney, and also to his said executrix, she for payment of what was so due to the appellant assigned the said bond to him, reciting the same to be for an onerous cause. The respondent, on the other hand, states, that Christian the widow was then very old and infirm, and that she executed the said assignation (ignorantly thinking she had a title to do so) and left in it a blank, with intention to fill it up with the name of the respondent (who was then under age,) or with the name of some other person in trust for him, in order, as she thought, to save him expences afterwards: and that after the death of Christian, the appellant continuing to direct the respondent in his affairs, took all the respondent's papers into his custody, and put his own name in the blank of the aforesaid assignation.

An apprising was after the date of the assignation obtained against the debtor's estate, in name of Christian the widow: in 1667, the appellant gave him a charge of payment on the bond, but it was not till 1682, that the appellant received payment of it.

The respondent having confirmed himself executor to Thomas Cushney his grandfather, in 1711 brought an action before the Court of Session, of count and reckoning against the appellant as overseer under Cushney's will, in which he charged the appellant with sundry articles as received by him, and among others, with the contents of the said bond for 1000*l.* Scots with interest received by the appellant.

After sundry proceedings in this action, the Court, on the 10th of June 1715, "Found it proved that the appellant had received the sum in the said bond, and was accountable for the same; but not for the other articles claimed." And to this interlocutor the Court adhered on the 24th of the said month of June.

The appellant then contended that no trust appeared in the said assignation; on the contrary, it was mentioned to be for an onerous cause: but, though there had been a trust, it did not appear

that the respondent had right to the whole, since he had a brother, Thomas Anderson, who was entitled to a moiety : and, though there could have been any claim or demand by the respondent, yet the same was prescribed, the assignation being dated in 1666, and no action commenced till 40 years after. The Court, on the 8th of July 1715, “ found that Thomas Cushney had right and “ title to the whole debt in controversy, and that the respondent “ and his brother Thomas had right and title thereto from Cush- “ ney; and therefore the respondent had good title to the half “ thereof, and remitted to the Lord Ordinary to hear parties’ “ procurators on the respondent’s title to the other half thereof, “ which belonged to Thomas Anderson; and also to hear parties “ on the onerous cause of the disposition in favour of the ap- “ pellant; but repelled the objection and allegiance of pre- “ scription.”

The appellant then stated that he had paid several debts upon the respondent’s account, which would more than compensate any demands against him; and the cause being pleaded before the Lord Ordinary, his lordship, on the 26th of July 1715, “ found “ that Thomas Cushney had right to the haill sums in Strichen’s “ bond, and repelled the objection against the libel, and sustained “ the defence, that the appellant had paid a debt for the respon- “ dent or his grandfather to *Forbes of New* relevant to compense “ *pro tanto* and to be proved *scripto*, and granted diligence for “ proving the same.” And upon a reclaiming petition against the first part of this interlocutor, the Court, on the 30th of the said month of July “ decerned against the appellant for the sur- “ plus of Strichen’s money over and above what was alleged to “ have been paid to *New*, and ordained the surplus to be liqui- “ dated.”

The appellant afterwards contended that the said trust, if any was, had been discharged; and he founded upon a discharge, dated the 4th of August 1670, executed in his favour by Christian as executrix to Thomas Cushney, reciting the appellant’s faithful services to her in her affairs, and that he had made a just account with her; and therefore she discharged the appellant of all his receipts and intromissions and of all others entrusted to him preceding the date thereof, dispensing with the generality thereof as if every particular were therein inserted : and he likewise contended that the assignation by Christian to her husband during the marriage was void and revoked by the posterior assignation to the appellant. The Court, on the 21st of December 1715, “ Found that Christian Guild having ratified her husband’s tes- “ tament after dissolution of the marriage could not revoke the “ disposition made by her to her husband in so far as concerns “ her interest in the sum due by Tyre and Strichen, and that the “ appellant being by Thomas Cushney’s testament overseer both “ to his relict and also to the respondent, that the narrative of the “ relict’s assignation to the appellant could not prove the same “ to have been granted for an onerous cause in prejudice of “ the respondent: and that the general clause in the dis- “ charge



"charge by the reliēt to the appellant does not extend to this subject."

The appellant having brought no proof of the payment to Forbes of New, conform to the interlocutor 26th July 1715, the Lord Ordinary, on the 10th of January 1715-16, circumducted the term against him, and decerned for principal, interest, and penalty, in terms of the libel. The appellant having reclaimed, the Court, on the 9th of February 1716, "Affoizied the appellant from the penalty in Strichen's bond, and allowed the decreet pronounced by the Lord Ordinary the 10th of January to be extracted for the half of the other sums there decerned for, but as to the other half granted diligence till the day of June next to the appellant, for recovering instructions of his compensation by the payment to Forbes of New, and for recovering the grounds of compensation, whereby the half of the sums alleged to belong to the respondents' brother Thomas Anderson is pretended to be compensated, reserving *contra producenda*." The appellant afterwards presented a representation to the Lord Ordinary, which was refused on the 28th of February, and a reclaiming petition to the Court, which was also refused on the 29th of the same month.

The appeal was brought from "an interlocutor of the Lords of Session of the 10th of June 1715, and the affirmance thereof the 24th of the same month, and also of an interlocutor of the said Lords the 8th of July following, and likewise from an interlocutor of the Lord Fountainhall Ordinary in the cause of the 26th of the said month, and of an interlocutor of the Lords of Session of the 30th of the same month, and of an interlocutor of the 21st December following, and of another interlocutor of the said Lord Ordinary the 10th of January 1716, and of an interlocutor of the Lords of Session the 9th of February 1716, and from an interlocutor of the said Lord Ordinary of the 28th of the same month, and also from an interlocutor of the Lords of Session of the 29th of the same month."

Entered  
14 March  
1715-16

*Heads of the Appellant's Argument.*

The respondent has no title to the bond in question since he claims it by a deed from a wife to her husband during marriage, which by law is void.

Though the respondent had any title, yet that is prescribed by the act of parliament 1469. c. 28.; for the assignment of the bond to the appellant is in 1666, and no action was ever commenced against him for it till 1711, which is more than 45 years, in which time all actions by the law of Scotland are barred.

Though the action were not barred, yet the very deed of assignment of the bond to the appellant bears the same to be for an onerous cause, or valuable consideration, and therefore it is the greatest hardship in the world to oblige the appellant, now almost 50 years after the date of the assignment, to condescend upon

and prove the particular onerous cause or valuable consideration for which the same was granted; for it ought to be presumed both from the deed itself, and from the length of time that there was a valuable consideration.

Though the said bond had been assigned only in trust, yet that trust is presumed to have been executed, and the same accounted for; since in August 1670, four years after the said assignment, the executrix of Cushney, under whom the respondent claims, granted a general discharge to the appellant of all his receipts and of all things entrusted to him, which certainly at such a length of time is to be presumed to include this assignment.

*Heads of the Respondent's Argument.*

With regard to the prescription, the respondent claims only such sums as the appellant, his trustee, has received within these 40 years; for he received payment of the foresaid bond in 1682, (as appears by the appellant's release to the debtors) which is not 40 years ago.

Cushney's widow could not convey the said bond to the appellant, she and her sister having conveyed it before to her husband in 1661, to which the appellant is a subscribing witness; and receipts and vouchers under the appellant's hand were produced in court, to prove that he acted as trustee for the widow and grand children according to the will.

By Cushney's will his widow is only to life-rent his estate; and though she be named executrix and universal legatrix, yet he expresses that his intention was to empower her to make an inventory of his personal estate, and to manage all for the good of his grand-children: That his will might not be altered, he added a clause to it, which his wife and daughter subscribed, whereby they consent to every article therein recited, and bind themselves never to do any thing prejudicial to the will, and to which the appellant is a subscribing witness. Nor does it appear, that the widow ever designed the contrary; for nine months after the date of the assignment there was an apprising on the said bond, at her instance, against the debtor's estate; and the afore said blank in the assignment, in which she intended to put her grandson's name, is filled up with the appellant's name, in a different hand and ink from the body of the writing. Nor is there a sum specified in the assignment as the valuable consideration, which is necessary and usual according to the forms practised in Scotland. The appellant contended, that he had paid two debts of Cushney's, one to Innes of Towybeg, and the other to Forbes of New, which were the onerous consideration thereof: But that these debts were not the onerous consideration appears by the appellant's giving the respondent a bond in 1688 (22 years after the assignment) to relieve him of Innes's debts, because the appellant had received 50*l.* of the *Master of Salton* upon the respondent's account, which is acknowledged in the said bond of relief for paying that debt.

The respondent does not sue in right of his mother and grandmother, but as heir at law and executor of his grandfather Cush-

ney, to whom the said bond was conveyed by his wife and her sister; and therefore her discharge to the appellant could not invalidate the respondent's right, nor could it comprehend or acquit the appellant of his future actings, he having received the said sum twelve years after the date of that discharge. And that bond being secured by a real right, no general words in a discharge can be an acquittance of it.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutors therein complained of be affirmed: And it is further ordered, that the said appellant do pay, or cause to be paid, to the said respondent, the sum of 30*l.* for his costs in this House.* Judgment, 24 May, 1716.

For Appellant, Rob. Raymond. Will. Hamilton.  
For Respondent, Nathan Lloyd. James Stuart.

Andrew Porteous in Deboig, - - Appellant; Case 42.  
Thomas Fordyce, and Janet Scott his Wife, Respondents.

26th May 1716.

*Cautioner.*—A person who had, without confirming, intromitted with his father's effects, which were left to him by will for payment of debts, is, upon application of the creditors, ordained to intromit with the effects upon inventorying the same, and finding caution to make the same forthcoming: he accordingly finds caution, and upon a subsequent application for summary intromission with some of the effects, the Court refused the same, and ordained him to confirm the testament and prosecute in common form; but he neither inventoried the effects, nor confirmed the testament: the cautioner was liable for the whole goods intromitted with.

*Proof.*—A debt against this cautioner substantiated by the oath of the intromitter in another cause.

*Costs*—30*l.* costs given against the appellant.

**R**OBERT Scott of Gillespie, deceased, grandfather of the respondent Janet, by his will and testament, dated the 25th of December 1706, bequeathed all his personal estate to Thomas Scott his second son, with express directions to pay the several debts in the said will mentioned, and appointed the said Thomas his sole executor. Amongst other debts in the said will mentioned and ordered to be paid, Robert Scott charged himself as debtor to the respondent Janet in the sum of 4573*l.* 13*s.* 8*d.* Scots.

After the decease of the said Robert Scott, the said Thomas possessed himself of several of the goods and effects granted to him as aforesaid, but did not confirm himself executor to his father. The respondent Janet, and other creditors of the said Robert Scott, in July 1708, brought their action against Thomas for payment of their debts, and by a petition presented for them stated their apprehension that Thomas Scott, his mother and brother Francis might confederate and waste the funds appropriated for the payment of their debts, and therefore prayed,

that Thomas Scott might inventory the said goods and effects, and find security for the due application thereof, in terms of the will. In answer to this petition Thomas Scott acknowledged the said will, and that he intended to execute the same, and pay all his father's debts; and that he was willing to find security for the due management and application of the trust funds. The Court accordingly, on the 31st of July 1708, "Authorized and ordained the said Thomas Scott to intromet with, sell, and dispose of the said goods upon inventorying thereof, he finding sufficient caution to make the same, or prices thereof, forthcoming to these who shall be found to have best right thereto." Accordingly, in these terms the appellant became cautioner or surety for the said Thomas Scott.

In November 1709 Thomas Scott applied by petition to the Court, praying that he might have a warrant for summary intromission with certain of the goods and stocking in the hands of the widow and youngest son; and on the 25th of that month, the Court "refused to allow Thomas Scott summary intromission with the goods and stocking; but ordained him to confirm his father's testament, and prosecute his right in common form as accords."

Thomas Scott, however, neither confirmed the testament nor made up inventory: And in June 1715 the respondents brought an action against the appellant as cautioner for the said Thomas Scott for payment of the said debt of 4573*l.* 12*s.* 8*d.* Scots due to the respondent Janet by the deceased. The appellant made defences, that the sequestration could extend no further than the effects received thereupon subsequent to it, and before the same was withdrawn by the Court, when in November 1709 they ordained Thomas Scott to confirm his father's testament; and that the appellant could never be liable for the whole effects received before the caution given, much less for those in the possession of the widow and son, with which Thomas had never intrometted. This cause coming to be heard before the Lord Ordinary, his lordship, on the 22d of July 1715, "found that the appellant, as cautioner, must be liable for the hail goods intrometted with by the said Thomas Scott, as well before as after the sequestration; and found that by Thomas Scott's acknowledgment upon oath in the decree obtained at the instance of Crawfurd of Brocklock against him, as well as in the former decree in this process against the said Thomas it is sufficiently proved that he intrometted with goods, and gear of his father's to the value of the sums principal, and annual rents claimed by the respondents; and therefore found the appellant as cautioner for the said Thomas Scott liable to the respondents for the sums principal and annual rents libelled for, and decerned against him therefore."

The appellant reclaimed, and the respondents having given in answers, their lordships, on the 29th of July 1715, "adhered to the interlocutor of the Lord Ordinary, and refused the desire of the petition." The appellant presented a second reclaiming petition, stating, that Thomas Scott's oath in Brocklock's cause  
could

could not affect the appellant, since it was *res inter alios acta*, and besides contained this quality, that all he had received was applied in payment of his father's debts; and therefore the appellant prayed, that the Court would find that Thomas's intromissions were exhausted by payment of his father's debts, or by expences in making the funds effectual, and to assign the appellant a term for proving thereof. After answers for the respondents, the Court, on the 30th of July 1715, "refused the desire of the petition, and adhered to their former interlocutors."

The appeal was brought from "an interlocutor of Lord Kimmerghame Ordinary of the 22d of July 1715, and also from "an interlocutor of the Lords of Session of the 29th of the said month, affirming the aforementioned interlocutor; and likewise from another interlocutor of the said Lords of the 30th of the same month."

Entered,  
23 Jan.  
1715-16.

*Heads of the Appellant's Argument.*

The appellant cannot be liable to the respondent's demands, because the bond that he entered into, pursuant to the said decree of the Court of Session of the 31st July 1708, was expressly annulled and made void by a subsequent sentence of their lordships on the 25th of November 1709, whereby the first decree was recalled, and Thomas was ordered to confirm or prove his father's will, in common form; which, by the known law of Scotland, requires him to find another cautioner or surety for his due administration.

Though the decree of the 31st of July 1708, allowing Thomas to intromet, be in general terms, yet the appellant, as surety for that intromission, cannot be construed to be liable for any other effects than what were then in some other person's possession; because neither the creditors nor Thomas could crave possession of what they or he was actually possessed of before. Nor could Thomas Scott be supposed to have applied for a compulsitor for the recovery of any goods, but what had not been formerly in his possession; and therefore the appellant can be liable for no more than what actually was or might have been received by virtue of the said sequestration: For, supposing that some other person than Thomas had been allowed to intromet with the goods for the use of the creditors upon finding surety, and that the appellant had been bound for that other person's due application of the money, certainly his bond could not have been extended to the money received before that time by Thomas, and applied in the terms of the disposition. And the appellant conceives that if Thomas had been called to an account by the persons allowed to intromet, it would have been a good defence for Thomas to have pleaded payment according to the disposition by his father to him.

It is true that Thomas had acknowledged upon oath in another cause that he had received 13,000 merks Scots out of the goods and effects conveyed to him by his father; but all of it before the appellant's becoming surety for him; and the oath itself particularly mentions, that the sum was wholly applied towards the payment

ment of his father's debts, as by the said disposition is directed, which the appellant offered to prove below, but was refused.

The appellant insists and is advised, that he might have excluded the respondent's claim, by offering to prove and proving in the terms of his obligation, that the intromissions were made forthcoming to those who had best right, but the appellant was denied that benefit.

*Heads of the Respondents' Argument.*

The appellant was security for the said Thomas Scott's just application of the trust vested in him, and for making up an exact inventory, which must have contained the whole goods and effects bequeathed to him and the values thereof: For the creditors must have had most in view the due administration of what he was possessed of, since that was by far the greatest part. Nor did the Court ever re-call this power granted to Thomas, but only declined to give him an extraordinary power of immediate intromission against his father's debtors; this was justly refused, and he ordered to follow the rules of law. And if it should be admitted that this could have been interpreted as a re-calling of the power as to the effects in the possession of other people, it could make no alteration as to those Thomas himself was possessed of.

Thomas Scott having accepted of the trust, wherein the debts to be paid are particularly specified without proving the will or making any inventory, the law of Scotland presumes, that he had received as much as would pay the debts particularly specified. Nay, the law presumes by his acceptance in this manner, that he agreed to charge himself with the debts, and take his hazard of the extent of the effects bequeathed to him: For, otherwise the creditors in such cases might be precluded from recovering their debts, since they have no rule whereby to charge the executor in trust, and if Thomas was liable, the appellant was liable as his security. But further, the said Thomas in another action owned upon oath that he had received to the value of 12,000 or 13,000 merks Scots, and sets forth how he had disposed thereof, and charges the debt due to the respondent Janet as one of the debts he was obliged and intended to pay.

Judgment,  
26 May  
1740.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the several interlocutors therein complained of be affirmed: And it is further ordered, that the said appellant do pay, or cause to be paid to the said respondents, the sum of 40l. for their costs in this House.*

For Appellant, Rob. Raymond. Sam. Mead.  
For Respondents, J. Jekyll. Da. Dalrymple,

John Cuninghame of Enterkine, - - - *Appellant*; Case 43.

The Hon. Katherine Hamilton, Relict of  
Wm. Cuninghame of Enterkine, the  
Appellant's Mother, - - - *Respondent*.

8th June 1717.

*Tenor.*—The tenor of a lost deed of remuneration to a wife over certain lands, for part of her jointure secured upon other lands renounced by her, found to be proved by an instrument of sasine; a deed in which the remuneratory deed was recited, and a slender proof by witnesses:

It was not necessary to prove the *casus amissionis* in this case:

The defender having claimed a proof that his mother, the pursuer, in his minority, had intromission with all his father's deeds and writings, the same is refused.

**B**Y the marriage contract between the appellant's father William Cuninghame and the respondent, in December 1676, John Cuninghame of Enterkine, the appellant's grandfather, in consideration of the said marriage and of 777*l.* sterling, the respondent's portion, did settle upon her a life-rent of 275*l.* sterling, payable out of the barony of Monkton and other lands, in which she was duly infeft.

About seven years after the marriage it became necessary to sell the said lands of Monkton, and on the 11th of October 1683, the respondent joined in a deed with her husband, legally ratified by her, to re-convey the said lands to the grandfather. But she retained a life-rent of 100*l.* issuing out of other lands settled for that purpose by her marriage contract.

The respondent states, that in consequence of her renouncing her interest in the lands of Monkton, the appellant's father did, in recompence and remuneration of the lands so renounced, execute a deed, settling upon the respondent the lands of Enterkine and others in life-rent; and that upon this deed she was duly infeft, on the 21st October 1683, and the sasine recorded the 20th of November thereafter: That after her husband's death in 1690, she entered to possession of the lands of Enterkine, and continued without interruption in the same; but having lost the remuneratory deed the appellant questioned her right, and she, in December 1711, commenced an action for proving the tenor of the lost deed, before the Court of Session against the appellant.

The appellant at first insisted that the respondent should prove the *casus amissionis* of the deed, and he himself craved a proof that the respondent had had a total intromission, with his father's title-deeds after his death, before proceeding to a proof of the tenor: But the Court, on the 13th of February 1712, allowed the respondent to proceed in her action. Accordingly, she insisted upon several adminicles or vouchers to prove the tenor of the deed; These were, 1st. The probability that the respondent should  
be

be secured in lands equivalent to those she had renounced. 2d. An instrument of sasine in favour of the appellant, dated the 21st of October 1683, bearing that in pursuance of a deed then delivered to the notary by the appellant's father, and read in presence of the witnesses, sasine was made and given to the respondent of the several lands in question. A disposition, dated the 11th of August 1683, signed by the appellant's grandfather and father, in which the whole estate was conveyed to the latter, in three several parts of which was a reservation of the respondent's life-rent in the lands now claimed. And lastly, She examined two witnesses, the import of whose depositions she states to be, 1st, Colin Campbell swears, he saw a life-rent deed granted to the respondent out of her husband's estate, but cannot remember the particular lands, being at 28 years distance, only that the lands of Enterkine and some other lands were mentioned in that deed; (the respondent had no right to these lands by her marriage settlement). The other, Mr. Baillie of Lamingtoun, when he signed as a witness to the respondent's renunciation, was assured by the appellant's father, that the respondent was secured in the equivalent of what she had renounced.

After a hearing of the cause, the Court, on the 18th of June 1713. "found the tenor of the remuneratory or compensatory right and disposition libelled or granted by the said William Cuninghame of Enterkine, with the consent of John Cuninghame of Enterkine, his father, to and in favour of the respondent, of the date and contents particularly above-mentioned, made up and proved, and therefore decerned and declared the said deed to be a sufficient and valid evidence, and of as great force and effect as if the said remuneratory deed itself were yet extant, and not omitted and lost *casu fortuito*." The appellant reclaimed two several times against this interlocutor, but the Court adhered to the same.

The appeal was brought from "an interlocutor of the Lords of Session of the 18th day of June 1713, and the affirmances thereof."

Entered  
21 Feb.  
1716-17.

#### *Heads of the Appellants's Argument.*

When this action was first commenced, the Court did refuse the appellant the benefit of proving that the respondent had a total intromission, with his father's whole writs and evidents when he the appellant was under age. This probation, if it had been allowed, might in all probability have cleared this affair.

The law of Scotland, and the constant practice of the Court of Session, require that when issue is joined and no proof made of the *casus amissionis*, the action is to be dismissed; yet the Court allowed the respondent to proceed in her action without proving the *casus amissionis*, and to proceed in the proof of the other parts of her libel.

The respondent has proved nothing of the other parts of her action by the adminicles or vouchers she brought into the court below; for

1st. The



1st. The conveyance by the appellant's grand father can be no voucher. This conveyance contains nothing of the substance of the deed pretended to be lost, only the additional lands claimed by the respondent are in the deed, partly interlined and partly written on the margin thereof, not subscribed; nor are they written with the same hand or ink with the rest of the conveyance, as evidently appears by inspection. Such interlineations and unsubscribed margins are by the law of Scotland entirely null and void, as appears by the act of parliament 1681. c. 5. wherein 1681, c. 5. it is statuted, "That all writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null." But neither the writer of this interlineation and unsubscribed margin, or who were witnesses thereto, are designed in this conveyance of 16th August 1683.

Nor does the interlined conveyance recite the substance of the said lost deed, or any clause of it: It mentions, too, that the deed pretended to be lost was of the same date with the said conveyance; yet by the oath of William Baillie, the respondent's own witness, it appears that he was a witness to the said conveyance the 16th of August 1683, but depones that at that time there was only a deed *to be done* in favour of the respondent. And further, though the said conveyance mentions also in the body thereof, that the respondent's renunciation of Monkton is likewise of the same date with the deed; yet notwithstanding the renunciation proves itself to have been made two months after the date of the said conveyance, viz. on the 11th of October 1683.

2d. Neither can the respondent's infestment be admitted as a voucher of the substance and reality of the deed pretended to be lost, because it is not a notary's business to enquire into the substance or verity of deeds, for he can infest persons at any distance of time after signing, without making any enquiry whether the deed be true or false. But it is evident from the said instrument of sasine that there was no such deed as pretended by the respondent, and that the notary gave the respondent infestment upon the foresaid interlined conveyance only. For in the clause of Having and Holding the interlined conveyance only is narrated, and also it appears that there was a blank left in the instrument of sasine which should have been filled up with the date of the pretended deed (if there had been one); but this blank is filled up *ex post facto* with the date of the interlined conveyance only, which neither contains the substance of the pretended deed, nor is there any precept in this interlined conveyance for infesting the respondent. And therefore the date of the said interlined conveyance was ignorantly inserted in the blank which is in the instrument of sasine, instead of the date of a deed that had a precept or warrant for infesting the respondent. The Court below has always rejected the instruments of notaries as a proof of the substance and verity of deeds, as appears in the cases decided 14th June 1667, Harroway v. Haitly, and Corfar v. Durie in Dirleton's decisions, and the case decided 15th July 1675, Phumerton v. Lutefort in Stair's decisions.

3d. Nor

3d. Nor is there any part of the tenor of the deed pretended to be lost proved by the respondent's two witnesses, viz. Mr. Baillie and Mr. Campbell. From their depositions it appears that they prove nothing as to the reality, the tenor, the date, the writer's name, the parties subscribing, or the witnesses subscribing to the said deed pretended to be lost. These are the essentials of every deed, and the proving of them in such a case as this is absolutely required of a pursuer by the law of Scotland.

*Heads of the Respondent's Argument.*

Though the respondent had intromitted with her husband's papers, as she never did, and had got the remuneratory right there, yet it was still a deed belonging to her, and was the same as if it had been lying by herself, since the taking infestment upon it was a clear evidence of her husband's intending it for her security. And that she had again renounced that right in favour of her husband, is not probable; for the law of Scotland appoints such renunciations to be recorded within sixty days after they are executed, and if there had been such, the appellant might have got an office copy of it.

The proving of the *casus amissionis* in all cases of proving the tenor of a deed is not necessary. It is indeed reasonable to be done in cases where the execution of a deed is the only solemnity required, and the retiring or cancelling is a sufficient release. But in rights of lands, as this is, which require other solemnities than the deed itself, such as *saſine*, &c. the retiring of the deed is not a sufficient discharge, because the instrument of *saſine* remains upon record. So that nothing but a formal discharge or renunciation could extinguish that right, as is observed by Lord Stair in his Institutions, and it is also cleared by a decision of the Lords of Session, 26th July 1662, Lady Miltoun against her Husband; and therefore in such cases the presumption is that the right was truly lost.

Stair's Decisions.

Though the appellant pretended that the instrument of *saſine* was only the assertion of a notary, and would not prove any thing; yet these instruments being admitted by public authority, great deference and faith is had to their veracity. And the instrument of the notary is not the only voucher in this cause, though if there were no other proof even that would be sufficient. The precedents quoted by the appellant differ from the present case: the respondent renounced her jointure, in which she was secured by her marriage-settlement, which was the onerous cause of granting her a remuneratory right. But all suspicion of any kind is certainly taken off by this, that *saſine* was given to the respondent upon the remuneratory right by her husband's order seven years before he died by the same notary, and in presence of the same witnesses who infest the appellant in the fee of the estate; and immediately thereafter both instruments were put in the public record by the said notary.

But another proof of the deed in question (and which of itself is sufficient) was the deed of settlement, made upon the appellant, wherein

wherein there is a particular proviso in three several parts thereof, reserving to the respondent the lands in question settled upon her as a jointure in lieu of the lands of Monkton, which she had renounced. By that deed it is evident that a remuneratory right or deed in lieu of what the respondent had renounced was granted to her; so the instrument of sasine in pursuance of the deed in question is in these very lands, as inserted in the conveyance to the appellant. In this deed to the appellant the greatest part of the lands claimed by the respondent are inserted in the body of the deed, but the blank left for them being too small, the rest were written upon the margin, as it usually happens in such cases, but by the same hand, though a little contracted. But what seems to take off every appearance from the appellant's objection is, that the words following are all in the body of the deed, "reserving to the respondent during all the days of her lifetime." (Then follow the lands, part in the body and part on the margin,) "all lying in the barony of Torbolton, bailliery of Kyle, stewartry and sheriffdom of Ayr, whereunto she is now provided by me in life-rent conform to a heritable bond of the date of these presents, in lieu and recompence of the lands of Monkton, &c. whereunto she was likewise provided and inserted in life-rent by virtue of her contract of marriage, and which now at my request and desire she has disposed and renounced," &c. And as this deed shews that a recompence was granted, so the lands being specified and ascertained in the deed, sufficiently make up the loss of the respondent's jointure-deed: and whether the appellant enjoy the estate in virtue of that deed or not, does not alter the case; since he does not deny that it was a true real deed done by his father.

There is no occasion for witnesses, where the deed and solemnities are proved by writing, as in this case they are by the instrument of sasine, and deed of settlement to the appellant.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutor and affirmances thereof complained of in the said appeal be affirmed.* Judgment,  
8 June 1717.

For Appellant, *Dun. Forbes. Spencer Cowper. Rob. Raymond.*

For Respondent, *N. Leckmere. Will. Hamilton.*

Case 44. George Hamilton, an Infant, and William  
 Fountain- Hamilton of Grange, his Father, Tutor  
 hal, 19 Dec and Administrator in Law, - - Appellants;  
 1701.  
 Forbes, Captain George Boswell, Brother to David  
 25 July & Boswell of Balmutto deceased, - - Respondent.  
 22 Nov.  
 1705.

10th Feb. 1717-18.

*Representation.*—A disposition is made by a person to one of his daughters, and the heirs of her body, whom failing to ———, his heirs and assignees: upon this disposition the daughter is infest, and dying without issue, her sister is served *tanquam legitima et propinquior heres* to the father and her: it is found that the service ought to have been as heir of provision.

*Curtsey* — An heiress's infestment, reduced after her death for informality, but not quarrelled in her lifetime, is sufficient to support the curtesy.

JOHN Bruce of Wester Abnie, deceased, had two daughters, Margaret and Elizabeth. Margaret the eldest was married to the respondent, Captain Boswell; and had issue one daughter, Margaret Boswell, who afterwards became the wife of the appellant William, and mother of the appellant George. John Bruce, the father, made a disposition of the said lands of Wester Abnie and others to his said daughter Elizabeth, and the heirs of her body, whom failing to ——— his heirs and assignees whatsoever. The said John Bruce soon after died, as did also the said Elizabeth his daughter, (to whom infestment had been given on the disposition), without heirs of her body; whereby the said subjects descended to Margaret Boswell, daughter of the respondent and the said Margaret, the daughter of John Bruce, Margaret the mother being then deceased.

The respondent's daughter being under age, he had caused her to be served in *special tanquam legitima et propinquior heres* to her grandfather John Bruce and her aunt Elizabeth; and after this service infestment was taken, and the instrument of sasine duly recorded. The respondent entered to the possession of the estate, and received the rents and profits thereof.

By contract of marriage, entered into in October 1698, between the appellant William, and the respondent on the part of the said Margaret his daughter, it was agreed, that the respondent should give his daughter 6000 merks in marriage portion; and in consideration thereof, that she and the said William Hamilton, after their marriage, should make a conveyance in favour of the respondent, her father, of the estate she had succeeded to as aforesaid. The marriage accordingly took effect, and in consequence of the said contract or agreement, the appellant William, and his wife Margaret, who was still under age, executed a disposition of the premises to the respondent.

Soon after the appellant William and his wife brought an action before the Court of Session against the respondent for reduction of

of the said contract or agreement, and the disposition made in consequence thereof, as being obtained by fraud, and while Margaret was under age. The pursuers stated, that at the time of the treaty for the marriage, the respondent represented the estate to be worth nothing, as being greatly incumbered, and insufficient to answer the debts: that however out of regard to his daughter the respondent proposed to give her the said 6000 merks, in consideration of their conveying the estate to him. And that the pursuers being entire strangers to the circumstances of the estate, and relying upon the respondent's veracity, agreed to the terms proposed.

After sundry proceedings in this action, and a proof relative to the lesion taken therein, the Court, on the 19th of December 1701, found "That Margaret Boswell, being a minor when she signed her marriage contract and the disposition, she ought to be relieved against the same; but, that William her husband, being of age, and having proved no concussion or circumvention, the reasons offered by him were not sufficient to relieve him against the deeds subscribed by him before and after his marriage; and therefore assilzied the respondent from his action." And after a count and reckoning, the Court, on the 25th of July 1705, "reduced the said deeds in so far as they were granted or subscribed by the said Margaret Boswell, and could be any way extended against her and her heirs; and found that she ought to be reponed against them upon enorm lesion and minority; and likewise reduced the said obligation entered into by the appellant William, whereby he under a penalty obliged himself, that the said Margaret should convey, but the appellant William being major assilzied the respondent from the said action so far as the said appellant William could have any right by his *jus mariti* or curtesy to the subject disposed by his wife and him to the respondent (a)."

Margaret, the respondent's daughter, dying in 1710, the appellant William, her husband, caused their son the appellant George to be served heir to John Bruce his great grandfather, and Elizabeth his great aunt: and thereupon commenced two several actions in the name of his son before the Court of Session, against the respondent; the one to reduce and make void the rights and titles that had been established in the person of Margaret the wife; and the other to remove the respondent from the life-rent estate.

The causes were conjoined, and after sundry proceedings the Court, upon the 29th of June 1714, "Found that by the conception of the disposition by John Bruce to Elizabeth, and she having died without heirs of her own body, the succession did not devolve upon Margaret Boswell as heir of line to Elizabeth, but devolved upon the heirs of line of John Bruce as heirs of provision to Elizabeth, and that the titles the appellant

(a) These interlocutors and affirmances thereof form the subject of a second appeal between the same parties in 1721; but they do not enter into the present question.

" had made up for his son carried only the right of superiority  
" and were not sufficient in a removing."

The appellant George's titles were made up of new in terms of that interlocutor; and it was contended on his part that his mother's service and sasine not being as heir of provision to Elizabeth, the same was void. The Lord Ordinary, by interlocutors on the 25th of January and 25th of February 1714-15, reduced the said Margaret's " sasine, and decerned the respondent to quit the possession, since Margaret was not served heir of provision to Elizabeth." But the Court, on the 24th of June 1715, " found that Margaret Boswell's relation was cognosed both to John and Elizabeth Bruce in terms of the foresaid interlocutor of the 29th of June, and remitted it to the Lord Ordinary to hear parties upon the nullities objected to Margaret's infeftment."

Parties being afterwards heard on the alleged nullities of the retour and infeftment, before the Lord Ordinary, his lordship, on the 15th of July 1715, " sustained the first nullity objected against Margaret Boswell's retour as heir to the deceased Elizabeth Bruce, in regard Elizabeth Bruce was infeft upon her father John Bruce his precept in all the lands disposed by him to her, whereby she held the lands of John Bruce the disposer, and not of the crown as the record bears. And as to the second and third nullities that the precepts for infefting the said Margaret were not directed to the proper officers sustained the same, and likewise the objection against the said Margaret's infeftment of the burgage lands, in respect her predecessor Elizabeth Bruce her infeftment therein was null, the same bearing to be past on the precept in John Bruce's disposition, and yet that precept of sasine does not contain these lands."

1695, c. 24.

The respondent having reclaimed against this interlocutor, insisted, that though there might have been some omissions in the form of passing these sasines, yet although she had never been infeft the curtesy ought to subsist; and in support thereof he founded upon the act of parliament 1695, c. 24. intitled, " An Act for obviating the frauds of apparent heirs." And he contended that she having been in possession for many years, the appellant her son could not pass by her, but must be liable to her deed, whereby the curtesy to her husband was supported. And 2dly, That the infeftments, not having been objected to in Margaret's lifetime, were sufficient to support the curtesy. The Court, on the 27th of July 1715, " repelled the defence upon the act of parliament, but found, that Margaret Boswell's infeftment not having been quarrelled in her own lifetime was sufficient to support the curtesy." And upon the 28th of July " absolvizied the respondent from the appellant's action."

The appellants having reclaimed, the Court, on the 15th of June 1716, " found, that the respondent's right to the curtesy ought to subsist, in regard if his daughter's infeftment had been quarrelled in her lifetime, he might have made up the defects thereof by infefting her again." And to this interlocutor the Court adhered on the 4th and 20th of July thereafter.

The

The appeal was brought from "an interlocutor of the Lords of Session, made the 24th of June 1715, and from that part of the interlocutor of the 27th of July following, finding Margaret Boswell's infeftment not being quarrelled in her lifetime was sufficient to support the curtesy; and also from the interlocutor of the said Lords of the 28th of July 1715, the 15th of June, 4th and 20th of July 1716."

Entered,  
22 March  
1716-17.

*Heads of the Appellant's Argument.*

Since the Court, by their interlocutor of the 29th of June 1714, found, that the succession did not devolve upon Margaret Boswell as heir of line to Elizabeth, but to the heirs of line of John Bruce as heirs of provision to Elizabeth, and upon this foot the appellant George was obliged to be served of new; it is hard to conceive how Margaret could claim the succession, since she is served only heir general to Elizabeth, which is entirely different from what the interlocutor requires; for in that case she ought to have been served *tanquam heres provisionis*, or *heres virtute provisionis*, and it is impossible that a person can be served heir of provision, and the service and retour say nothing of it.

The deed of conveyance made by the said Margaret and the appellant William of the lands in question to the respondent was reduced and declared null upon the head of minority and lesion, in so far as concerns the interest of Margaret and her heirs, but in so far as concerns the appellant William's curtesy it is not reduced. If Margaret the wife, however, was never infeft, then the husband could convey no curtesy, because he could have none. And it is an undoubted principle that the husband can have no curtesy but of such lands as the wife was in her lifetime seised in; but the wife in this case was not seised, or, which is the same thing, was not duly seised, and her infeftment was null. If then the wife was not infeft, or if her infeftments were null, and the succession did not really devolve upon her, how can that infeftment sustain a curtesy?

*Heads of the Respondent's Argument.*

Margaret was served *tanquam legitima et propinquior heres* to John her grandfather, and to Elizabeth her aunt; which being a general designation, applicable to all heirs *in suo genere*, though it did not express the word *heir of provision*, the same must be understood under all the characters, whereby she could represent them, and infeftment and possession of the lands was taken upon that service. The Court of Session, by their precedents (in Forbes's Decisions), *Livingston v. Menzies*, 22d January 1706, and *Lord Dalhousie v. Lord and Lady Hawley*, 13th November 1712, established this doctrine. And the reason is stronger in this case, where Margaret was served heir in special to her grandfather and aunt, which includes a general service.

Though the sales were reduced, yet the husband's curtesy must subsist, because there was no lesion to the heirs of the marriage; for when Margaret the heiress died, she stood infeft, and

in possession from the date of her service to her death, which was some years, and her father accounted to her and her husband for the rent of the estate till her marriage, and consequently the curtesy once took place, and so accreted to the respondent all the time she lived; and, if the respondent had not depended upon the disposition made to him by his daughter and her husband, he could easily have served her heir to her aunt and grandfather in the same manner the appellant William has done his son. It will not be pretended, that the appellant George could have succeeded while his mother lived; and for the same reason, not so long as his father lives; for it is not to be supposed, that his own birth, entitled him both to the fee and life-rent of the estate, and so to exclude his father and mother's interest therein. And it is observed by Lord Stair, in his printed Decisions, *Gray v. Gray*, 25 July 1672, that although an infestment or sasine were reduced as to the fee, yet that it did subsist as to the husband's life-rent; because, that there was thereby no lesion to the heirs, seeing it was presumed the husband would have cognosced his spouse heir, if that infestment had been quarrelled in her lifetime, and so enjoyed the curtesy.

Journal,  
10 Feb.  
1727-2.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed this House, and that the several interlocutors therein complained of be affirmed.*

On the point of the *representation*, the precedent does not appear to be observed by former Collectors of Decisions.

A part of the cause between the parties is given by Bruce but it seems merely interlocutory, being, in effect, subsequently reversed by the Court.



John Baskett, his Majesty's Printer in London, William, Agnes, and Elizabeth Hamilton, Grandchildren to the deceased Andrew Anderson, and Archibald Campbell Husband of the said Agnes, and Patrick Alexander Husband of the said Elizabeth, for their Interests, and John Campbell Printer in Edinburgh, claiming to be his Majesty's Printers in Scotland, *Appellants* ;  
James Watson, claiming to be one of his Majesty's Printers in Scotland, - - *Respondent*.

Case 45.

15th Feb. 1717-18.

*Public Officer*.—A gift of the office of King's Printer in Scotland is made to a person and his heirs, and his partners, assignees, and substitutes; he afterwards assigns to two others, each one-third of the patent; these assignees and the original grantee had each right to a third share in the grant of the office, equal in all respects, and each might use the title of one of his Majesty's Printers.

Certain objections made to an assignee under this grant, that the original grantee had not taken the oaths required by law, for taking which a space of time was limited, having assigned in the intermediate period; that this grant was made during the subsistence of a former grant, though to commence after expiration of such former one; and that it contained clauses and powers (some of which had been renounced) that were stated to be unusual and contrary to law,—found not relevant to reduce the same.

A new patent being obtained during the currency of the former, without any reduction thereof, and being founded on in this action, the decree is nevertheless ordained to be extracted, without prejudice to the grantees in the new patent, to insist on the gift in their favour as accords.

The Court having found, however, that the partners in the patent first mentioned might print Bibles, &c. and dispose of the same in any part of his majesty's united kingdom or elsewhere; upon appeal, these last mentioned words are ordered to be omitted in the affirmance of the judgment.

**K**ING Charles the Second, in May 1671, granted a patent to Andrew Anderson deceased and his assignees, to be his majesty's printer in Scotland, with the sole power of printing Bibles, New Testaments, acts of parliament, and every thing published by authority, for and during the term of 41 years. This patent expired on the 12th of May 1712.

Soon after it had been granted Andrew Anderson died, and the office was enjoyed and the business carried on by his widow.

When the patent to Anderson was near expiring, the respondent, a printer in Edinburgh, Robert Freebairn, a bookseller, and Richard Watkins a stationer, the latter being trustee for the appellant John Baskett, his majesty's printer in England, entered into an agreement to use their joint interest to procure a new patent. And accordingly by articles executed by them on the 9th of March 1710-11, it was agreed, "That if a grant of queen's printer in Scotland could be obtained, in one or either of their

“ names, or to any other person for their behoof, they should be  
 “ equally concerned in the same, and should employ their interests  
 “ conjunctly. And Mr. Freebairn obliged himself to go to Lon-  
 “ don; and the charges (if the said grant was procured) were in  
 “ respect of Freebairn’s trouble therein to be borne by the other  
 “ two; but if the same did not succeed, Freebairn was to be at  
 “ equal charge with the rest.” And the respondent states, that  
 he advanced to Freebairn 300*l.* towards the charges of obtaining  
 such grant.

On the 11th of August 1711, her then majesty granted her  
 letters patent of the office of king’s printer in Scotland to the said  
 Robert Freebairn, reciting the said former grant to Anderson, and  
 the time it would expire; “ and considering that it would be neces-  
 “ sary for her and her subjects in that part of Great Britain called  
 “ Scotland that the said office should be timely provided for: and  
 “ that they on whom she should bestow the same should be pro-  
 “ vided with materials and printing instruments whereby they  
 “ might more readily and commodiously serve her and her sub-  
 “ jects in that part of her said kingdom, as soon as the said grant  
 “ to Anderson should expire: and that the said Freebairn had  
 “ undertaken for himself and his heirs, and for his partners,  
 “ assignees, and substitutes, that all books to be there printed  
 “ should be more correctly published than heretofore they had  
 “ been by his predecessors; her said majesty did make, nominate,  
 “ and appoint the said Freebairn her sole and only printer in  
 “ Scotland, for the term of 41 years, to commence immediately  
 “ after the expiration of the said grant to Anderson, without pre-  
 “ judice to the time therein mentioned; giving and granting unto  
 “ the said Freebairn and his aforesaid the sole privilege of print-  
 “ ing all Bibles, New Testaments, Psalters, Common-prayer books,  
 “ according to the use and custom of Great Britain and Ireland;  
 “ and of printing and re-printing acts of parliament, proclama-  
 “ tions, and whatever should be published by authority; and of  
 “ the books of the common and municipal laws of Scotland,  
 “ whensoever the grant thereof to her majesty’s then printer or  
 “ other particular persons should respectively expire;” with the  
 clauses and powers of prohibiting all others, and confiscations as  
 usual in the like grants.

In September 1711, Freebairn assigned the third part of his  
 interest to the appellant Baskett; who by agreement was to cre-  
 dit the company with paper for 12 months, and also was to pay  
 a moiety of the charges of passing the said patent, and a propor-  
 tionable part of the charges of setting up and hiring a printing-  
 house. And on the 30th of April 1712, Freebairn also assigned  
 to the respondent one just third part and share of the said office,  
 and of all privileges and profits thereof; the 300*l.* advanced by  
 him, as he states, being more than his share of the charges of  
 obtaining the patent.

Disagreements, however, soon arose among the parties, and in  
 January 1713, the respondent took a protest under the hands of a  
 notary, requiring Freebairn and Watkins (on behalf the appellant  
 Baskett)

Baskett) to perform their respective parts of the said agreement, or, otherwise, that he would act separately. The respondent afterwards brought an action of declarator before the Court of Session against Freebairn, the appellant Baskett, and Watkins his trustee; and his libel concluded, "That it should be found and declared, that the respondent had as good a right in the said gift of printing as the said Freebairn and Baskett, and that neither of them ought to assume other title, than one of his majesty's printers, and that the respondent as one of his majesty's printers might print Bibles, acts of parliament, &c. and might sell and dispose of the same in any part of the united kingdom and elsewhere." Freebairn made defences, that the gift of the office was to him solely, and that the assignment was only of a share of the profits, to be managed in company according to the articles. The Lord Ordinary, on the 8th of February 1715, found that the respondent had a right to a third share in the gift pursued on, equal in all respects with the said Freebairn and Baskett, and that he might use the title of one of his majesty's printers." And this interlocutor was afterwards adhered to both by his lordship, and by the Court, on the 17th of June 1715.

Pending this action, the parties had acted separately under the said office; and on the 8th of December 1714 Freebairn, assisted by the interest of Baskett, obtained a warrant from King George the First to have a new grant of the office made to him solely. The respondent, however, having represented that he had right under the said patent granted by Queen Anne, a stop was put to the passing of the said new grant.

The respondent afterwards brought an action against Agnes Campbell, since deceased, widow and assignee of the said Andrew Anderson, and the other appellants his representatives, to have it declared that the gift in favour of Anderson was expired, and that all Bibles and other books contained in the gift to the respondent, and printed by the said Agnes Campbell or the representatives of Anderson, since the expiration of the gift to him, should be confiscated in terms of his gift; and that they might be discharged to print any more of such books or to sell those already printed. It was insisted for Agnes Campbell, that the gift made by Queen Anne was granted to Freebairn alone; but he not having qualified himself for the said office by taking the oaths required by law, the gift became void, and he could not communicate the benefit of it to any other person whatsoever. That the grant to Freebairn was during the subsistence of the former grant to Anderson; and that the grant to Freebairn, under which the respondent claimed, was by express words recalled and voided in a subsequent grant to him by King George the First. The Lord Ordinary having made a report of the cause, the Court, on the 17th of July 1716, found, that the respondent's interest and title by the gift did not fall or become irritate by Mr. Freebairn not qualifying within three months of the date of the gift; and also repelled the defence, that after the said first gift to Freebairn he obtained a second gift; and also repelled the defence that the said

" first gift was granted, before expiring of the former gift in favour of the said Agnes Campbell, the said first gift to Freebairn being to commence at the issue or expiration of the said former gift."

1 Geo. 1.  
c. 13.  
It was afterwards contended that the respondent himself had not qualified according to law; but he insisting that he had qualified within the time limited by the act of 1 Geo. 1. c. 13., the Lord Ordinary on the 19th of July " repelled the allegation, and " decerned and declared, that the respondent, as one of his majesty's printers, might print Bibles and acts of parliament, and " other public papers, and sell and dispose of them in any part " of his majesty's united kingdom or elsewhere; and declared " the gift in favour of Andrew Anderfon and his heirs expired; " and decerned the said Mrs. Anderfon and the appellants her " grandchildren to desist from any new impressiion, or further " printing of any Bibles, acts of parliament, and other papers " concerning the Government, or selling the same, from and " after the 1st of July 1715."

Pending this last action, the king granted a new patent for being king's printer in Scotland to the said Mrs. Anderfon, and to the appellant Baskett; but she died soon after. Baskett and the representatives of Mrs. Anderfon produced the new patent to the Court and claimed the benefit thereof, and prayed that the right under the same, and the right to that under which the respondent claimed, might be discussed and settled before any judgment given. But the Court, on the 14th of December 1716, " Ordained the " respondent's decree to be extracted, but prejudice to the appellant Baskett to insist on the new gift in his favour as accords." Baskett and the other appellants afterwards brought an action of reduction to make void the gift under which the respondent claims; and then they presented a petition, (in the former action) complaining of the before mentioned interlocutors: but the Court, on the 18th of December 1716, " refused the desire " of the petition, reserving the appellant's right by the new gift " as accords."

Entered,  
22 March  
1716-17.

The appeal was brought from " an interlocutor or decree of " the Lord Grange in Scotland, made the 8th of February 1715, " and the affirmance thereof by the Lords of Session the 17th of " June 1715, and also from another interlocutor or decree of the " Lords of Session of the 17th of July 1716; and also from another " interlocutor or decree of the said Lord Grange, the 19th of the " same July, whereby his lordship decerned and declared, amongst " other things, ' That James Watson, as one of his majesty's " printers, might print Bibles and acts of parliament, and other " public papers, and sell and dispose of them in any part of his " majesty's united kingdom or elsewhere;' and also from two " other interlocutors of the said Lords of Session of the 14th and " 18th of December 1716."

#### *Heads of the Appellants' Argument.*

The patent to Mr. Freebairn, under which the respondent claims, contained several very illegal clauses: particularly it gave the

the patentee a liberty and privilege of printing and importing Bibles from beyond sea, which is contrary to all good policy, and of very dangerous consequence. It contains a power of confiscation or forfeiture of all books printed or imported contrary to the privilege granted by that patent, and gives the half of the penalties to the patentee; but this seems to require the warrant of an express law, and not to be imposed without the authority of the legislature. It grants the sole privilege of printing all books of law, viz. the municipal laws of Scotland, which is entirely illegal and against the just liberty both of authors and printers, which by no law in Scotland is restricted, as to books of law, more than as to books of divinity or medicine, or any other science. These and several other illegal clauses are contained in this patent, and no sooner was it granted, but they were complained of, and a reference was made to Sir James Stewart, then Lord Advocate, who reported the said patent, upon these and other reasons, to be absolutely void and null, which should either oblige the patentee to renounce and surrender the same, or at least subject it to be reviewed and rescinded, and so make place for another, more legal and warrantable. His majesty has accordingly granted a patent to the appellant Baskett, and to Mrs. Anderson, under whom the other appellants claim, avoiding that formerly granted to Mr. Freebairn.

It is the constant practice and custom of the Court of Session, not to determine in favour of any grant, when another appears and pleads a better right till they once hear both parties; for it is otherwise prejudicing the one party by giving judgment unheard: and the rather in this case, because the respondent having brought his action to have his grant established, the appellants pleaded this new grant as a separate and total defence to that demand.

Mr. Freebairn being the only patentee, and not having taken the oaths within the time limited by law, the gift became void, and the office fell, and therefore he could not communicate the same, nor any of its consequences; and though he assigned a third part to Watson before the time in which he should have taken the oaths, yet the title to the office was imperfect and incomplete in the person of Freebairn until he should take the oaths; but he never having done that, the right resolved and became void from the beginning.

Supposing Mr. Freebairn's grant were good, it was against reason to decree a confiscation of all books to the respondent alone, since the appellant Baskett has by his own shewing an equal share in that grant with the respondent.

By the decree the respondent is declared to have right to print Bibles, &c. and to dispose of and sell the same in any part of his majesty's united kingdom. This is directly contrary to and inconsistent with the patent granted to the king's printers in England, whereby all persons are prohibited to import any Bibles into England,

*Heads*

*Heads of the Respondent's Argument.*

The said Freebairn was only a trustee for the respondent as to one third of the grant; and the respondent cannot by the laws of Great Britain incur any forfeiture by Freebairn's delinquency; not only because Freebairn was neither convicted nor the time elapsed for taking the oaths. No new grant can be legal during the subsistence of a former grant. The respondent, for a valuable consideration of 300*l.* paid to Freebairn before such delinquency, had a grant of one third in the interest of the said former patent, and hath also expended 2000*l.* for carrying on the said employment for the benefit of the public. But Baskett, who has a grant of the office of king's printer in England, and who farms the University press in that country, seeks by this present appeal to engross the whole trade of printing the *word of God* in Scotland also, which, if he prevail in, it will make Bibles, New Testaments, and Common Prayer Books very scarce and dear, having already raised the price some 60 per cent. And in further prejudice of the respondent's right he has assumed to himself in his late editions of Bibles and Common Prayer Books the stile of King's Printer for Great Britain.

The appellants' aforesaid action of reduction is not yet ripe for the determination of the House of Peers, till the same have had a previous and judicial determination in Scotland.

Judgment,  
15 Feb.  
1717-18.

After hearing counsel, *It is ordered and adjudged, that the said interlocutor of the 19th July 1716 be so far varied as that the words after-mentioned, viz. "in any part of his majesty's united kingdom or elsewhere," be omitted, and that the said interlocutor or decree as to all other parts thereof, as also the several other interlocutors complained of in the said appeal be affirmed.*

For Appellants,    *Spencer Cowper.    Sam. Mend.*  
For Respondent,    *Tho. Lutwyche.    Rob. Raymond.*

Sir John Schaw, of Greenock, Bart. - *Appellant*; Case 46.  
 Dame Margaret Schaw, alias Houston, and  
 Sir John Houston, Bart. her Husband, - *Respondents*. Bruce,  
15 July  
1725.

10th March 1517-18.

*Tailzie*—A father infeft in an estate in life-rent, and a son infeft in fee, jointly entail the estate in the son's contract of marriage, with prohibitory, irritant, and resolute clauses, and with a proviso, that the father and son should jointly have power to alter; this entail was insert in the register of tailzies upon the joint supplication of the father and son, but no resignation was made nor infettment taken thereon: the irritancies and clauses not to alter were binding upon the son (after the father's death) even supposing the substitution were gratuitous.

**I**N 1686, Sir John Schaw, Bart. deceased, father of the appellant and respondent Dame Margaret, settled his estate of Greenock upon himself in life-rent, and failing him to the appellant and the heirs male of his body in fee, whom failing to the other persons therein mentioned; reserving a jointure to the appellant's grandmother of about 72*l.* per annum, and about 150*l.* per annum to his mother, and a power to the father to raise 50,000 merks for younger childrens' portions, and to make leases for his life and 19 years after at one-third less than the then rent.

A marriage being afterwards agreed upon between the appellant and Margaret, the daughter of Sir Hew Dalrymple, Lord President of the Session, by their contract of marriage in March 1700, entered into with the special advice and consent of their respective fathers and mothers, who are parties thereto, and subscribe the same, the said Sir John the father, and the appellant, in consideration of the marriage and of the portion of the said Margaret Dalrymple, bound and obliged themselves jointly and severally with mutual consent to resign their lands and estate therein particularly mentioned; viz. the lands and barony of Greenock, and also the lands of Broadstain and others, (which last were not contained in the settlement of 1686) to Sir John the father in life-rent, whom failing to the appellant and the heirs male of his body by that or any future marriage; whom failing to his five younger brothers successively and the heirs male of their bodies, whom failing to the heirs male of Sir John the father's body, by his then or any future wife; whom failing to the respondent Margaret and *the heirs of her body*; with several other substitutions of heirs, whom all failing to the heirs and assignees whatsoever of the appellant. The deed contained the usual prohibitory, irritant, and resolute clauses against the appellant and the heirs of entail, and clauses to the following effect:

*Reserving power to Sir John the father, and the appellant, during their joint lives, with mutual consent, to alter or discharge any of the said prohibitory and irritant clauses and conditions as they should jointly think fit; and to alter the said course of succession, except in so far as*  
*concerned*

*concerned the provisions thereby conceived in favour of the said Margaret Dalrymple, &c.*

Provided, that out of Sir John the father's life-rent, there should be particularly excepted and reserved to the appellant for his and his wife's present maintenance, lands of the yearly value of 6000 merks, to be increased as they should have children :

And Sir John, the father, thereby renounced his power of charging the estate of Greenock with 50,000 merks for his childrens' portions, and all the other powers, which he had reserved by the settlement in 1686; and, his wife Dame Eleanor, with his consent, gave up her life-rent in the said estate of Greenock, to which she was entitled by her contract of marriage :

And in regard the heirs female of the appellant's body, failing heirs male thereof, were thereby excluded from the right of succession to the said estate, there was a particular provision of 50,000 merks made for their portions.

There were two parts of the said contract executed by all the parties in presence of the then Lord Chancellor of Scotland, and above 40 other lords and gentlemen, who all of them subscribed their names as witnesses thereto: but no resignation was made, or charter and sasine taken out thereupon. Upon a petition, however, in the name of Sir John the father, and the appellant, signed by Sir David Cuninghame, uncle to the appellant's wife, their procurator, the Court of Session ordered the contract to be recorded in the register of entails pursuant to act of parliament; and it was therein registered accordingly, and the deed returned to the appellant.

The appellant's father having died, and also his five younger brothers without issue, and the respondent Margaret then standing the next substitute failing issue male of the appellant, the respondents brought an action before the Court of Session against the appellant, to compel him to exhibit the said contract of marriage, to the end that it might be ordered to be registered in the books of Session, and the respondents have an extract thereof. The appellant brought a counter action against the respondents to declare his right to alter the succession, and dispose of the property as he should think fit, as to all others except the heirs of the marriage; upon the ground, that notwithstanding these prohibitory clauses, yet he, as having the fee of the estate vested in him long before the said marriage-settlement, and being the first maker of the entail, could not be tied up by them, but might still alter the said order of succession, and cut off all other substitutes, except the heirs of the marriage, for whose security the contract was treated for and made.

In the debate arising on both these actions, it was at first alleged for the appellant, that the said contract of marriage was his own proper evident, wherewith he might do as he pleased, and that therefore he was not obliged to produce the same, before it should appear on the event of the action, that the respondents had a right to require the exhibition and registration thereof. The respondents made answer, that Dame Margaret being expressly nominated



dominated in the entail, which was a contract and conveyance of lands, she had good right to call for production thereof, to the end the same might be preserved. The Court thereupon "Ordered the appellant to exhibit, reserving all defences against registration or any other legal effect."

The contract being accordingly exhibited, after various proceedings, the Court at first, on the 22d of February 1715, "Found that the irritancies in the appellant's contract of marriage did not affect the appellant who made the tailzie, and therefore declared in favour of the appellant, so far as concerned the lands contained in the charter and investment 1686."

The cause, however, being re-heard upon the petition of the respondents, the Court, on the 15th of July 1715, "Found that the irritancies and clauses not to alter contained in the contract of marriage were binding upon the appellant who made the tailzie, even supposing the respondent Dame Margaret were a gratuitous substitute." The respondents having then applied to the Court to have the appellant's counter action dismissed, their lordships, on the 30th of July 1715, "Found the tailzie a delivered evident, and ordained the contract containing the same to be registered in the books of Council and Session, that any concerned might take extracts thereof, and assilzied the respondents from the appellant's declarator."

The appeal was brought from "an interlocutor of the Lords of Session the 15th of July 1715, and also from an interlocutor of the said Lords of Session, dated the 30th of the same July." Entered,  
20 March  
1717.

#### *Heads of the Appellant's Argument.*

It is certain, that before the said marriage-contract, the appellant was possessed in fee simple of the estate intended to be tailzied, and the interlocutors appealed from suppose the tailzie to be gratuitous or voluntary with respect to the respondent. That a tenant in fee simple could settle the order of his succession by tailzies as he thought proper, by the law of Scotland, was not doubted; nor was it doubted that he could alter such entail whenever he would: but of late men were not contented to settle their estates by way of entail, changing the order of succession from the heirs at law, to any other heirs; they proceeded to add conditions or limitations for restraining their heirs from altering the order settled by such entails, and that if the heirs of entail should do contrary to such conditions, their right should become irritated. These clauses are called prohibitory and irritant clauses, but it still remained a question till the year 1685, whether such irritant and prohibitory clauses expressed in tailzies did limit the heirs of entail and bar them from altering the succession or charging with debt. But it is remarkable that throughout the act 1685, c. 22. the legislature had no view to abridge the power known to belong by the law of Scotland to makers of tailzies, of altering the destination or order of their own succession; but only  
to

to make their own destinations the more effectual by confirming what limitations soever the makers should think fit to impose upon their heirs. So that, at present, tailzies in Scotland, in so far as concerns the maker's power of altering are regulated, by the principles of the common law of that country; but in as far as relates to the restrictions and limitations of the fee in the persons of the heirs of entail, tailzies are regulated by the above-recited act 1685.

That the maker of a gratuitous or voluntary tailzie has power to alter it at pleasure by the law of Scotland, is evident; 1st Because tailzies, as they regard the makers of them, are really destinations of succession, which by the known principles of the civil law, copied in that particular by the law of Scotland, are alterable at the pleasure of him who made the destination; nothing being more common than that a variety of accidents should with justice alter his intentions before his death, it was judged necessary, as well as expedient, to provide that a man should not have it in his power to deprive himself of the faculty of settling his succession as he should find proper by any previous voluntary deed. This fundamental maxim of the civil law, in matters of succession, the law of Scotland has admitted universally, with one exception, and that is where a settlement is made for an onerous cause; in such a case, the law of Scotland looks upon the tailzie to be in effect a contract, which justice obliges the performance of, and therefore does not allow the maker to alter at pleasure.

Hope.

Stair's Instit.

Dirlaton's  
Doubts and  
Stewart's  
Answers,  
p. 146, 147.

Ld. Lindores  
against Oli-  
phant and  
Stewart,  
Dalrymple,  
8 Dec. 1714.  
Bruce,  
18 Feb.  
1715.  
Scott of  
Hardin v.  
Scott of  
Raeburn,  
a subsequent  
case in this  
Collection.

2d, As this position is agreeable to the principles above established, so it is the unanimous opinion of all the writers on that subject: the learned Hope, in his *Lesser Practicks*, lays it down for certain, that a bond of tailzie *ex nulla causa onerosa* is revocable, but admits that it is binding, if it be granted for an onerous cause, or in view of a mutual tailzie. And Lord Stair, in his *Institutes*, b. 2. tit. 3. § 59. agrees in the same opinion, with this difference, that though a tailzie be made for an onerous cause, yet if that consideration were not adequate to the tailzie, it may be altered. Of the same opinion are the other lawyers who treat of this subject.

The appellant supports their opinion by the decisions of the Lords of Session in two important cases, lately determined, where the Judges were unanimous. The first was, the case of Lord Lindores against Oliphant and Stewart. The other case was that of Scott of Harden against Scott of Raeburn. Both these cases do incontrovertibly support the reasons insisted upon by the appellant, and prove, that the first maker of an entail cannot by any clauses be tied up from the power of disposing of his inheritance as against all voluntary substitutes.

But further, as the maker of a tailzie must, from the nature of that settlement, be possessed of a faculty of altering it, the appellant conceives, that he having by the deed now in question reserved to himself the fee of the estate according to the law of Scotland, and as the property does still absolutely remain with

the appellant, the power of alienation must likewise remain with him. It is true, that if the appellant had made himself life-renter, he could not have pretended to the power of alienation, because the fee in that case would have been lodged in another; and it is equally true, that an heir of entail limited with usual clauses, cannot alter: but neither of them is the case here; the appellant was and still is absolute fiar.

*Heads of the Respondents' Argument.*

There is nothing plainer than that, as a man having an unlimited fee or property, may dispose thereof at pleasure; so he may lessen or restrain his own right in favour of another, and what is granted to that other, is as much his property as what remains with the first proprietor. It was indeed, in the appellant's power to have joined in making this entail or not; but when he had joined in making thereof, whereby the estate is limited, for want of heirs male, to the respondent Dame Margaret by name, with prohibitory and irritant clauses, not only upon the heirs of entail, but expressly upon the appellant himself, he and all the heirs of entail are thereby bound up and disabled from making any alteration therein, whereby the appellant's right or property, which was before free and unlimited, is become limited. There are here not only the ordinary prohibitory and irritant clauses, but an express obligation on the appellant and all his subsequent heirs to stand seised and possessed by virtue of that contract and by no other title. But, besides, it appears in this case, that Sir John Schaw, the appellant's father, was tenant for life in possession, with the reservation of a jointure for his lady; so that the appellant was not proprietor of the whole fee simple; and the appellant's father and mother joined in this settlement, and thereby made a present provision for the appellant and his lady, which they could not have had, without the father and mother's joining; and therefore the appellant ought to be bound by the terms and agreements of the deed in which they joined.

The appellant contended, that by the contract of marriage, the fee was vested in him, whom all the heirs therein mentioned, or whoever might succeed to the said estate, must represent, and therefore could not controvert, but must fulfil his deeds; and in case of the appellant's contravention, no person could be served heir, for that the next in succession must be served heir to him, (which would be absurd, for that he had lost his right) and not to his father, for he was denuded. But this argument *de absurdo* is of no validity; for, as to the question, whether the appellant be bound or not by his contract, it is to be determined without regard to what might fall out. And if the appellant should contravene, upon an action brought against him by the next in succession, he would be decreed to denude, and adjudication would follow thereupon in favour of the next heir of entail, by virtue of the obligation in the settlement for that purpose.

The statute 1685 gave a liberty to persons to tailzie their estates, and burden their heirs as they thought fit, which before then had been

been controverted, as if a person could not burden heirs that were not in being; and the design of the statute was to prevent that objection. But it was never brought in question, either before that statute or since, whether a present and absolute proprietor could tie up himself as he thought fit; and the act of parliament does no way relate to that matter.

The entail is in a contract of marriage, whereof there were two parts subscribed and mutually interchanged and delivered: and the same was registered in the register of entails, by decree of the Lords of Session, upon a supplication of the appellant and his father, mentioning to be for the benefit of all parties therein concerned: and this being a complete contract, and having the force and effect of a delivered evident or deed, there was no distinction either as to the grantor or grantees, whether the same was completed by charter and sasine or not, since the power to alter did not arise from this; that it was but a personal obligation, but from the nature of the thing, for whatsoever the charter and sasine could do, the personal obligation had, by the law of Scotland, the same effect against the grantor to oblige him to fulfil; and with respect to the grantor's power of altering, there is no difference whether it was completed by charter or not; and the appellant might as well have altered the succession as to his five brothers, were they now living, as to think of doing it to the prejudice of the respondent.

The preference given to the respondent Dame Margaret by the said contract of marriage had been fully concerted and agreed to by all parties, and was what her father had stipulated for her, and not the mere voluntary deed of the appellant. For by Sir John her father's settlement in 1686, while the appellant was a minor, he, the appellant, had not a free and unlimited fee in the said estate of Greenock, the same being considerably qualified and burdened by the father: but all these qualifications and burdens were by her said father, in the contract on the appellant's marriage, renounced and given up; and consequently what was thereby provided in her favour was a plain agreement between father and son, whereby her father prevailed with his son to prefer her to his own daughters in the succession, and that for valuable considerations.

These valuable considerations were; That by the settlement 1686, the estate in question stood charged with the value of about 13,000 merks for a jointure to the appellant's grandmother, and about 150*l.* per annum to his mother, who are still living, and with a power to Sir John the father to raise 50,000 merks for younger childrens' portions: Sir John the father had likewise a life-rent in the whole, and a power to make leases for his life, and nineteen years after, at one-third less than the then rent, whereby he might have raised fines. By the present settlement that power of making leases is discharged, and from the date thereof an immediate provision of 322*l.* sterling per annum is made for the appellant, with a covenant therein to add more to it, as his children should increase, and other lands included to the

the value of 100*l.* sterling, which were not comprised in the former settlement, and to which the appellant had no other right : and, besides, Sir John, the father, had a personal estate of 20,000*l.* sterling, which he might have disposed of at his pleasure, as he soon afterwards did to the appellant, the prospect whereof was a further inducement to the appellant to join in this entail, and to settle the succession as his father desired.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the said interlocutors therein complained of be affirmed.* Judgment, 10 March 1717-18.

For Appellant, *David Dalrymple. Rob. Raymond. Will. Hamilton.*

For Respondents, *Tho. Lutwyche. Sam. Mead.*

This case seems to be inaccurately reported in the Dictionary, vol. 2. p. 431. *vide* Tailzie.

Sir Peter Frazer of Doors, - - - *Appellant ;* Case 47.  
Isabel Sandilands, Widow of William Black  
Esq; - - - *Respondent.*

12th Jan. 1718-19.

*Presumption* — A person being sued in 1715. by the widow of one to whom, in 1697, he had granted a bond of pension for the consideration of managing the grantor's law affairs; though never demanded by the grantee during his life, the bond is supported and the money decreed for.

*Holograph.* — Whether holograph or not being referred to the oath of the grantor of a bond, the term is circumduced against him for not deponing.

*Costs.* — 40*l.* costs given against the appellant.

IN July 1697 the appellant granted a bond of pension to the late Mr. Black, advocate, the respondent's husband, of 10*l.* sterling per annum, to be paid at Whitfunday and Martinmas by equal portions, with interest after the respective terms of payment. The bond mentioned the consideration to be for Mr. Black's pains and management of the appellant's law affairs, and that it was to continue so long as the appellant had any law affairs. In July 1713, Mr. Black assigned the said bond to the respondent in trust for his children.

In 1715 the respondent, after her husband's death, brought an action against the appellant before the Court of Session for payment of the said bond and interest; stating that Mr. Black did, from the time of the date thereof till his death in August 1713, carefully manage all the appellant's law suits and other his affairs, but that neither the said pension, nor any part thereof, had been paid to him: and that the respondent, after her husband's decease, applied several times by herself and friends for payment of the

the money due upon the said bond, but the appellant always declined payment. The appellant contended that the bond was null, the writer and witnesses not being mentioned and described therein. The respondent answered, that the bond being holograph of the appellant, the designation of the writer and witnesses was not necessary; and insisted that the appellant should be obliged to confess or deny whether it was holograph or not. On the 27th of June 1716, the Lord Ordinary "sustained process upon the bond libelled, on the respondent's proving the same holograph; and ordained the appellant to confess or deny the fact against the 15th day of July then next, under the certification contained in the act of sederunt." No appearance having been made for the appellant, the Lord Ordinary, on the 18th of July 1716, "Held him as confessed, and decerned in terms of the libel."

The appellant afterwards presented a representation, stating, that he had been abroad several years, and had not had any law affairs, and that Mr. Black had been paid several sums of money on account of the appellant's law suits, which ought to be deducted from the said bond, and that the same never having been demanded, was to be presumed to have been paid. The respondent answered, that if Mr. Black had meant to re-call the bond he should have given notice to the respondent's husband, that he might have been at liberty to take other business: and that in 1713 her husband had gone on the appellant's request to his house, 100 miles from Edinburgh, to settle some of his affairs, and that no presumption of payment could lie to a bond of this nature. The Lord Ordinary, on the 25th of July 1716, "Adhered to the former interlocutor, but sustained the foresaid defence of payment as relevant to be proved *scripto* of the said deceased Mr. Wm. Black, or payment to the respondent since Mr. Black her husband's death relevant to be proved *scripto vel juramento* of her the respondent *cum onere expensarum* in case the appellant succumb, and assigned the 6th of November next for proving in the terms above mentioned." The appellant reclaimed, but on the 31st of July, their lordships "Adhered to the former interlocutors, and refused the desire of the appellant's petition." And on the 16th of November 1716 the Court "Circumscribed the term against the appellant for not proving payment, and decerned and ordained the appellant to make payment and satisfaction to the respondent of the said sum of 10*l.* of yearly pension from the 12th of July 1697 to the term of Lammas 1713; and of the interest of each moiety of the said pension from the term of payment thereof to the term of Lammas 1713, which being accumulated into one total sum was declared to amount to 282*l.* 2*s.* 6*d.* Scots, and in like manner to make payment and satisfaction of the interest of the said pension from the aforesaid term of Lammas 1713, in time to come, during the not payment thereof."

Execution being sued out upon this decree, the appellant brought a bill of suspension; and, after discussing the same, the Court,

Court, on the 12th of July 1717, "Refused the bill, and adhered to their former interlocutor."

The appeal was brought from "a decree of the Lords of Session of the 16th of November 1716, and an interlocutor of the 12th of July 1717, and several other interlocutors."

Entered  
21 Dec.  
1717.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the decrees and interlocutors therein complained of be affirmed; and it is further ordered, that the appellant do pay or cause to be paid to the respondent the sum of 40*l*. for her costs in respect of the said appeal.*

Judgment,  
12 Jan.  
1719.

For Appellant, *Abel Ketelbey. Geo. Lesbe.*

For Respondent, *Robt Raymond. Will. Hamilton.*

James Blackwood, of London, Merchant, *Appellant*; **Case 48.**  
John Hamilton of Grange, - - *Respondent.* **Forbes,**  
17 July,  
1713.

26th Jan. 1718-19.

*Tenor.*—The Court of Session having reduced a decree of proving the tenor of a bond, and an adjudication and decree of mails and duties following thereupon, for the reason that it was not proved who were the writer and witnesses: the judgment is, from the circumstances of the case, reversed, the reasons of reduction repelled, and the adjudication sustained.

*Damage and Interest.*—The Court, in an interlocutor prior to those appealed from, having sustained the adjudication for the principal sum and interest, without all accumulation, penalties, and expenses whatsoever, this latter part of their judgment is reversed.

**I**N 1679, Robert Blackwood, late merchant in Edinburgh, the appellant's father, deceased, brought an action before the Court of Session, against Alexander Hamilton of Grange, the respondent's uncle, then a minor, for payment of a bond, stated to have been granted by John Hamilton of Grange, deceased, the father of said Alexander, and Jane his wife, in the following manner: that John Hamilton and Jane his wife being indebted to the said Robert Blackwood in 1719*l*. Scots, they on the 24th of March 1674, granted him a promissory note for payment thereof; but the note not being paid when it fell due, the said John and Jane, on the 7th of September 1674, instead thereof, granted a bond to the said Robert Blackwood, whereby they obliged themselves, their heirs, &c. to pay 1000*l*. Scots, part of the said debt, at Candlemas then next, and 719*l*., the residue thereof, at Whitsunday thereafter, with interest of the said principal sum from the date thereof, and a penalty of 300*l*. Scots in case of non-payment. And the said action also contained a conclusion against the minor for payment of a debt of 228*l*. 2*s*. 7*d*. Scots, stated to have been incurred by his father and mother after the date of the said bond. In this action the said Robert Blackwood obtained a decree of constitution in absence against the

minor for payment of the sum contained in the bond, and also for the said other sum of 228*l.* 2*s.* 7*d.* Scots.

Robert Blackwood also brought an action against the said Jane the relict, and Richard Elphinston her then husband, for payment of the sums before mentioned, in virtue of a promise made by her, after the death of her first husband, to pay the same: and in this action he also obtained decree; but this decree was only to take effect against the said Jane, but not against her then husband.

On the 14th of February 1680, the appellant's said father also obtained a decree of adjudication against the said Alexander Hamilton as heir to his father, whereby the lands and barony of Grange, and other lands therein mentioned were adjudged for payment of the said sums then accumulated to 278*ol.* Scots.

Robert Blackwood afterwards brought an action before the Court of Session against the said Alexander Hamilton, for proving the tenor of the said bond, which he stated to have been produced in one of the said actions, and left in the hands of Mr. Mackenzie, one of the clerks, and to have been accidentally lost by a fire which happened in or near Mr. Mackenzie's office. On the 4th of June 1698 the Court "Found the tenor of the said bond sufficiently verified and proved, and decreed that the copy thereof inserted should have the same force and effect as if the bond were extant."

In August 1701 the said Robert Blackwood, the appellant's father, conveyed the said debts and decrees to one George Clerk; and this Clerk, in November 1704, conveyed the same to the appellant. And the appellant brought an action of mails and duties, against the respondent (son of John Hamilton, deceased, a younger brother of the said Alexander, who entered to the possession of the said estate after the death of his uncle and father) then a minor, and his tenants of the premises; and decree was obtained for payment of the rents to the appellant and another creditor upon the said estate equally; and thereupon the appellant gave these tenants a charge of payment.

The respondent and his curators afterwards perceiving that the bond, which was the foundation of all the decrees before mentioned, as the tenor thereof was proved by the appellant's said father, wanted writer's name and witnesses, for which blanks were left in the decree for proving the tenor; they therefore brought an action against the appellant before the Court of Session for producing the said bond and decrees following upon it. In this action they stated that the decree of constitution in 1679 was obtained in absence against Alexander the minor, who had neither tutors nor curators, nor any guardian assigned to him, not only for the sum in the bond, but also for another sum, being the value of merchant goods; and so little care was taken in this affair of the minor, that though the pursuer in that cause did not prove that the goods were furnished, yet judgment was given against the minor for them, because the pursuer referred the furnishing to the minor's oath; and that though in law he could not depose,

yet



yet he was holden as confest, and judgment therefore given against him. They stated also, that the action was brought against Jane the widow, and Elphinston her second husband, not because she had executed the bond, but because she had during her widowhood promised to pay the debt. In this action, the appellant made defences, and the Court, at first, upon report of Lord Cullen Ordinary, on the 12th of February 1713. "Repelled the reasons of reduction proponed against the said decree of constitution, and sustained the adjudication foresaid against the heir (there being no competition of creditors) for the principal sum and interest without all accumulation, penalties, and expences whatsoever."

The respondent reclaimed, and the Court ordered the original probation made use of in the action for proving the tenor of the bond, with the decree therein, to be laid before them; and having considered the same, the Court, by an interlocutor on the 26th of June 1713, by a majority of one vote "Found it not proved, that the bond had writer's name and witnesses subscribing, and therefore found the tenor as proved null, and reduced the adjudication following thereon." The appellant reclaimed, and the Court again, by a majority of one vote, on the 17th of July 1713, "Refused the desire of the petition, and adhered to their former interlocutor."

The appeal was brought from "several interlocutors of the Lords of Session in Scotland of the 26th of June and 17th of July 1713, and of so much of the interlocutor of the 12th of February 1713 as takes away the accumulations, penalty, and expences." Entered,  
1 Dec. 1727.

#### *Heads of the Appellant's Argument.*

There never was the least exception against the justice of this debt; when the decree of constitution was obtained against the said Alexander, the bond was produced and was sufficient to prove the said debt, and needed not any further proof by his oath: and the passive title which subjected him to the payment thereof was also proved without his oath; for he was lawfully charged to enter himself heir to his father within the time prescribed by law, viz. 40 days; and his tutors and curators were duly summoned, and he or they for him, not refusing or renouncing his being heir to his father, the decree against him proceeded upon that presumed passive title, according to the constant practice in such cases.

The decree of adjudication was also had against him before the bond was lost, and became a real charge upon the estate: and the decree for proving the tenor of the bond did not pass of course on contumacy of absent parties, but upon mature and solemn consideration of the whole Court in presence, and upon as full and pregnant proofs and other corroborating evidence as could possibly be expected or were ever required in a case of the like nature. 1st, By the debt-book or ledger of the said Robert Blackwood the appellant's father, wherein was a memorandum of his own

hand-writing, that he had received a ticket or promissory note, written by the said John Hamilton the grandfather, and signed by him and his lady, and that he had afterwards received the said bond in place thereof, particularly expressing the manner and times of payment, and that Patrick Mac Gregor, and Alexander Campbell, servants to the said John Hamilton, were witnesses thereto. 2d, By the decree of constitution against the said Alexander Hamilton, wherein the said bond is mentioned to have been produced, and it is not to be supposed, that the Court would have given judgment thereon if it had wanted the writer's name or witnesses. 3d, By the decree in the action against the said Jane the relict, who appeared and made defence, wherein the bond was also produced, and if those requisite essentials had been wanting, her lawyers must doubtless have taken notice thereof. 4th, By the depositions of several credible witnesses, who proved the *casus amissionis* by fire.

After pronouncing the interlocutor of the 26th of June, the appellant prayed the Court either to reverse the same, or to allow him to amend his libel, or exhibit a new one, which was then offered, expressing the said John the grandfather to be the writer and his said two servants hereinbefore named to be the witnesses, which had been omitted in the said former libel, either because his father's lawyers did not think it needful, or were not apprised of the said memorandum in his debt-book or ledger; but the Court refused the desire of the appellant's petition,

#### *Heads of the Respondent's Argument.*

For preventing of frauds in deeds, there are several acts of parliament in Scotland, directing and requiring, that all deeds and securities should have certain solemnities, which are so essential, that if the deeds should be without them, they are declared to be void and null. By an act of parliament, 1593, c. 179., it is expressly enacted, "that all original chartours, &c. shall make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocese, and uther denomination of the writer of the body of the fore-said original writtes and evidentes; utherwise the same to make na faith in judgement, nor out-with in time cumming."

From this act it was insisted for the respondent, that the foundation of the three several judgments was the bond, pretended to have been given by the respondent's grandfather; but this bond not being produced, it was necessary to consider that which was decreed to stand in its place, viz. the tenor thereof which had been proved in the action for that purpose. The bond so proved wants the name and designation of the writer, and witnesses, and therefore it is void by the fore-said act of parliament. If that were not the case, then every person who hath a defective or null bond, or other deed, may throw it away, and allege it is lost, and offer to prove a tenor, wanting writer's name and witnesses,

(which are the solemnities for preventing of frauds,) and thereby carry off a man's estate, to which otherwise they had no manner of pretence.

The appellant contended, that since in the first decree obtained upon the said bond, express mention was made, that the original bond was produced, the law presumed, since a judgment was obtained upon it, that the same was formal and valid. But the presumption runs quite the other way, viz. that the bond was then the same thing it now appears to be in the tenor proved; and if so, then it was null. But if the principal bond was unexceptionable, then the tenor is not proved; or if it wanted writer and witnesses, as the tenor proved does, then it is void. But supposing there had then been a formal good bond produced, yet there being no such formal bond extant, the decree falls to be reduced for want of the necessary grounds and warrants; besides, no argument is to be drawn from a judgment obtained against a minor who is *indefensus*.

As no memorandum in a man's own books can make up the solemnity of a deed granted to him, so this very memorandum does not cure the present evil, since there is no mention of the writer; the want of which is one of the nullities of the bond.

The decree was not given against the widow upon this bond, but upon her promise to pay the debt during her widowhood; so that the merits of the bond never were in question in that action.

If the appellant think the bond was good, he may still go on to prove the tenor of a good bond *de novo*; nor will that be any inconveniency, since all the witnesses are still alive.

After hearing counsel, *It is ordered and adjudged that the said Judgment, 26 Jan. 1718-19. several interlocutors of the 26th of June and 17th of July 1713, and so much of the said interlocutor of the 12th of February 1713, as takes away the accumulations, penalty, and expences complained of in the said appeal be reversed; and as to the other part of the last mentioned interlocutor, the same is hereby affirmed.*

For Appellant, *Rob. Raymond. George Leslie.*  
For Respondent, *Tho. Lutwiche. Will. Hamilton.*

The judgment here reversed is given as a precedent in the Dictionary of Decisions, vol. 2. *vide* Tenor, p. 444.; and in Bankton, b. 4. tit. 29. § 6. Erskine, however, b. 4. tit. 1. § 57. was aware of this reversal.

In Fountainhall, 14 June 1707, a decision, *Trotter v. Home*, is reported, which seems of a contrary nature to the judgment of the Court below, in the present case: there, though the writer and witnesses could not be proved, the Court supported a bond.

Case 49. Katherine Stevenson, and Mr. James Gillon,  
 Dalrymple, Advocate, her Husband, - - - *Appellants;*  
 1714. Gilbert, Mary, and Eupham Fife, Children  
 3 Feb. 1715. of Gilbert Fife deceased, late one of the  
 Bruce, Baillies of Edinburgh, - - - *Respondents,*  
 3 & 19 Feb. 1715.

20th Feb. 1718-19.

*Heritable and moveable.*—A bond taken to a man and his wife in life-rent, and to their daughter in fee, and failing her by decease to the husband, his heirs, executors, or assignees; found to be moveable, that being but one substitution.

*Tutor and Pupil.*—A tutor having taken a heritable bond, in corroboration of a personal one, payable to the pupil and her issue, whom failing to three aunts, her nearest in kin *nominatim*; it is found that he acted warrantably.

*Succession.*—The three aunts having neither confirmed nor served themselves heirs, but one of them, who survived, being according to the tenor of the said heritable bond entitled thereto, assigned the same; in a question between the assignees and the heir, who was *then* also nearest in kin of the deceased pupil, the assignation is supported.

ALEXANDER STEVENSON, merchant in Edinburgh, deceased, on the 17th of December 1668, lent to Walter Young of Winterfield, the sum of 7000 merks Scots, and took from him a bond for that sum, payable to the said Alexander Stevenson and Katherine Wilkie his wife, and longest liver of them two, "in life-rent, and to Susanna Stevenson, their lawful daughter, in fee; and failing her by decease, to the said Alexander Stevenson, his heirs, executors, or assignees." Alexander Stevenson died intestate in February 1669, leaving his daughter and only child Susanna, an infant about 14 months old. His widow and three sisters, Christian, Susannah (married to Gilbert Fife, one of the baillies of Edinburgh), and Margaret, also survived him; and he left a nephew and niece, Alexander Stevenson and the appellant Katherine, children of a deceased brother.

Gilbert Fife, being appointed tutor to the said Susannah the infant, on the 6th of January 1671, took an heritable bond of corroboration from Walter Young the debtor, obliging him to pay the said sum to Katherine Wilkie the mother in life-rent, and to the said Susannah Stevenson her daughter, and to the heirs lawfully to be procreated of her body; whom failing, to Christian, Susanna, and Margaret Stevenson, her aunts, sisters to the said Alexander Stevenson deceased, equally amongst them, and to the said Gilbert Fife, husband to the said Susanna, for his interest, and to the heirs lawfully procreated or to be procreated of the said three sisters their bodies; and failing of any of them by decease without heirs of her body, and not making lawful disposition of their shares, then the portion of the deceasing sister or sisters to accrefce to the surviving. Upon this heritable bond infestment was taken.

Susanna

Sufanna the infant died about the age of four years, and her aunts Christian and Sufanna having also died without issue, and without making any disposition of their shares, Margaret the survivor, in January 1704. conveyed all her right and interest in and to the said bonds to George Denniston, in trust for the respondents, who were children of Gilbert Fife by a second wife, but no relations of the Stevensons. Denniston afterwards conveyed the same to the respondents. Margaret, the surviving aunt, took up the succession by virtue of the personal substitution to her in the second bond, and never made up any title by confirmation or service.

The creditors of Walter Young having brought an action of ranking and sale of his estate of Winterfield, the respondents appeared and claimed the said debt by virtue of the titles before mentioned. But in this they were opposed by the appellants, Katherine and her husband, claiming right through her brother Alexander Stevenson, the nephew and heir of the said Alexander Stevenson deceased. Alexander Stevenson jun. being indebted to his sister Katherine in the sum of 8500 merks Scots as her marriage-portion, the appellants charged him to enter heir to his uncle, and the daughter Sufanna, in the said original bond, and thereupon brought an adjudication, in which they obtained decree in December 1714.

A competition thereupon ensued between the appellants and respondents with regard to the right to the sums due by Walter Young. On the part of the appellants it was contended, that the original bond contained a gradual substitution of heirs, and was therefore heritable as to the succession; and that the tutor of Sufanna could not innovate the first bond in prejudice of the heir. The Court at first by an interlocutor, on the 17th of December 1714, "Found that the original bond conceived in favour of Sufanna Stevenson was heritable, and found that the innovation of the security by Sufanna's tutor in prejudice of the succession of the heirs could take no effect, and therefore preferred the appellants for the sums due by the original bond, as coming in the right of Sufanna's heirs."

The respondents reclaimed against this interlocutor, and after answers for the appellants, the Court, on the 3d of February 1714-15, "Having fully considered the case with the original bond granted by Walter Young to Alexander Stevenson, in which bond there is but one substitution to Sufanna Stevenson, heir of the sums therein, viz. to the said Alexander Stevenson, his heirs, executors, or assignees; found, that upon the death of Sufanna, the succession by the original bond would have devolved upon the executors of Alexander Stevenson, who were his own sisters, from whom the respondents derive right." The appellants reclaimed, and as no title by service or confirmation had been made up by the sisters, the appellant Katherine offered to make up a title in her person by confirming herself executor: the respondents made answer, and the Court, on the 19th day of February

February 1714-15, "Adhered to their former interlocutor, but "remitted to the Lord Ordinary to hear parties' procurators, "upon this point, viz. If the succession by the original bond "would have devolved upon the executors of Alexander Steven- "son, if the appellants confirming, or as executors *designative*, "serving heirs of provision before extract could be preferred to "the respondents, they not having shewn any right by confirma- "tion or service."

Parties were accordingly heard before the Lord Ordinary, who made report thereof, and the Court, on the 7th of July 1715, "Found that the tutor could not in his administration alter the "succession designed by the original bond; but that he acted "warrantably by taking the foresaid corroborative right, substi- "tuting those persons *nominatim* who were nearest of kin to "Alexander Stevenson, and might have confirmed themselves "executors to Susanna Stevenson the pupil." And to this in- terlocutor the Court adhered on the 19th of the same month of July.

Entered, 9 Dec. 1717. The appeal was brought from "several interlocutors of the "Lords of Session of the 3d and 19th days of February 1714-15, "and of the 17th and 19th days of July 1715."

*Heads of the Appellant's Argument.*

Dirleton,  
v. Tailzie.

By the laws and custom of Scotland, every bond that has in it a gradual substitution of heirs, is considered to be heritable, seeing it necessarily requires a service of the heir as a title to it: and this is expressly laid down by the learned Lord Dirleton upon the word *Tailzie*, where he says, that a bond like the present "is heritable in respect of the tailzie foresaid; there "being no tailzie of moveables or moveable sums. And the "provision in favour of heirs with the substitution foresaid, is "equivalent as if executors were expressly excluded." And this point was lately determined by the Court of Session, 19th February 1714, in the case of Walker and Simpson. The original bond in this case, therefore, should be looked upon as heritable, *quoad* the succession, seeing it contained several degrees of substitution: and although there had been but one degree of substitution, yet that very substitution or entail made the bond heritable as to the succession, and so to belong to the heir, and not to the executor.

But though the bond were moveable, and not heritable, and so part of the personal estate, and as such to descend to the executors of Alexander Stevenson, the original creditor; yet the same must now belong to Alexander Stevenson jun. the heir at law, and his sister Katherine the appellant, they being at present the next of kin to Alexander Stevenson deceased, (who died intestate,) the original creditor, and his daughter Susanna: and, consequently, all their estate, effects, goods, and chattels, both heritable and moveable, by the law of Scotland belonged to the appellant Katherine and her brother, none of the three sisters of the

the deceased Alexander, aunts to the appellants, having made up a title in their lifetime, by getting themselves confirmed executors dative as nearest in kin to the deceased.

It would be a thing of dangerous consequence to countenance such a practice in tutors, that during the infancy of their pupils, they might take upon them to alter the settlement made by the ancestors of the pupil contrary to their intentions: and without this the respondents have no title.

It is still more unfavourable in the present case, where the tutor has made such alterations in favour of himself and his children, to the prejudice of the right heirs; he having by his indirect practices endeavoured to defraud the true heirs of the sum of money in dispute, and to vest it in his own children, the respondents, who are entire strangers in blood to Alexander Stevenson, the original creditor, and Susanna his daughter.

#### *Heads of the Respondents' Argument.*

The original bond was certainly moveable, and to be held as personal estate: for to make a bond heritable, executors must either be excluded from the succession, or there must be a series of gradual substitution; especially if joined with this, that the successors who have the right of blood are cut off, and the succession is settled upon one who could not succeed otherwise than by virtue of the express provision in the substitution. But none of these occur in the present case, for failing of Susanna the fiar, the bond is conceived expressly to Alexander the father, his heirs, executors, or assignees, and Susannah having died an infant, the bond must be reckoned as much moveable as if the father had taken the bond simply to himself, his heirs, executors, or assignees, which without all question would have gone to executors. It is not the addition of the words *which failing*, that makes a bond heritable; for these words, though not adjoined, are implied in all bonds: as when a bond is taken to A. B., his heirs, executors, or assignees; that differs in nothing from a bond taken to A. B., *which failing*, to his heirs, executors, or assignees.

The plain intention of the said Alexander Stevenson who lent the money was, that having only one daughter Susanna, the bond was taken as a provision for her, and designed to belong to her, her husband, and children, in case she lived to have any; but failing of that event, the bond was to return to the same state as if her name had never been mentioned, viz. to Alexander Stevenson, his heirs, executors, or assignees, on the plain terms of an ordinary moveable bond. 2dly, Since the bond was conceived to Susanna, without mentioning her heirs, or executors, and yet was designed for her as a portion; it could not be imagined, that the father's design was to exclude the children of Susanna, and prefer his own other heirs or executors to them: In case Susanna had had children it would have gone to them as executors, because she being fiar, and no mention made of heirs, or executors in the bond, the case would have been the same thing, as if the bond had been granted to her simply, which by  
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the nature of the thing (money being a moveable subject,) would have belonged to her executors; and, therefore, since by the plain presumed intention of Alexander Stevenson the bond was moveable in the person of Susanna, he not having made mention of her heirs, but taken it simply to her, and so left it to descend to her executors, conform to the common disposition of law, it could never be claimed by any person as her heir. 3dly, Supposing that Susanna herself was only to have right, and not her heirs, nor executors, yet the respondents' case would be equally strong if not stronger, because where a right is taken simply to a person's self and not to their heirs, but to other substitutes, that person's right resolves entirely into a life-rent; and then the case would have been the same as if the bond had been taken to Susanna in life-rent, and to Alexander Stevenson, his heirs, executors, or assignees, in fee, in which case it was plainly moveable. 4thly, Supposing the bond had been heritable in the person of Susanna, yet so soon as the succession devolved upon the last substitute, viz. to Alexander Stevenson the father, his heirs, executors, or assignees, then the bond became a simple moveable bond, as if it had been conceived at first to Alexander, his heirs, executors, or assignees.

The first bond being by its conception moveable, the tutor acted very warrantably by taking the second corroborative bond, and substituting therein the same persons *nominatim* who were nearest of kin to Alexander the father, and might have confirmed themselves executors to Susanna the pupil.

There was no occasion for the aunts confirming themselves executors, because the tutor saved them that trouble and expence by taking the bond to them *nominatim*, which if the tutor had not done, they infallibly would have made up their own title by confirming themselves executors immediately upon Susanna's death: and though a tutor could not by any deed of his alter the course of his pupil's succession, yet he could so far meliorate the condition of his pupil, and his pupil's successors, as to save them the trouble of a service or confirmation by taking the right to these persons *nominatim*, who would have succeeded by virtue of the general word executors in the first bond. So that thus the substitution taken *nominatim* to Alexander's executors, (on whom the right devolved) establish the title sufficiently in the persons of these executors: and the respondent's derive their right from them.

Judgment,  
20 Feb.  
1718-19.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the said several interlocutors complained of be affirmed.*

For Appellants,	Rob. Raymond.	Will. Hamilton.
For Respondents,	David Dalrymple.	Tho. Lutwyche.



William Ayton Esq; - - - Appellant; Case 50.  
 Dame Margaret Colvill, Widow of Sir John  
 Ayton of Ayton, and Robert and Andrew  
 Ayton their Sons, - - - Respondents.

23d Feb. 1718-19.

Fountain-  
 hall,  
 23 Feb.  
 1706.  
 18 July  
 1710.  
 Dalrymple,  
 27 Nov.  
 1716.

*Representation.*—An eldest son of a marriage is retoured *legitimus et propinquior heres* to his father *cum beneficio inventarii*. In the inventory he gives up not only the lands settled upon him in his mother's contract of marriage, but also certain other lands; and afterwards brings a reduction of the provisions in a second contract of marriage, alleging, that he was only heir of provision in virtue of his mother's contract of marriage, and as such might still quarrel his father's deeds, the narrative of the retrour designing him heir procreated between a certain man and woman; it is found, that he was served heir of line to his father, and as such could not quarrel any of his father's deeds.

BY contract of marriage in 1670, between Sir John Ayton, the appellant's father, and Mrs. Magdalen Stewart, daughter of Sir William Stewart of Invernity, the appellant's mother, Sir John Ayton the grandfather, obliged himself to resign and surrender his estate of Ayton, and certain other lands, in favour of Sir John his son, and the heirs male to be procreated betwixt him and the said Mrs. Magdalen Stewart, whom failing to his heirs male of any other marriage, whom failing to his heirs, and assignees whatsoever, reserving a life-rent of part of the estate to the grandfather and his lady. In terms of this contract a crown charter was obtained, and investment taken by the appellant's father in 1671: and in 1672 that charter and instrument of sale were ratified and confirmed in Parliament. In 1684, the appellant's mother died, leaving him the only child of that marriage.

In 1701, Sir John the appellant's father, married the respondent Dame Margaret sister of the Lord Colville his second wife. By the contract upon that marriage, Sir John provided the said Dame Margaret in the life-rent of one half of the estate settled upon the heirs of the first marriage, and also in the life-rent of one half of the estate of Kincaigie, (not contained in his first contract of marriage); and he settled the fee of that estate of Kincaigie, to the children to be begotten of the second marriage; and further bound himself and his heirs to pay to the said children the sum of 2222*l.* 4*s.* 5*d.* sterling, with interest after they arrived at the age of seven years. Thereafter Sir John conveyed to his children, the respondents Robert and Andrew Ayton, the sum of 1333*l.* 6*s.* 8*d.* sterling, of personal estate; and left his debts to be paid by the appellant. The appellant states, that these debts amounted to 4000*l.* sterling; and that the yearly income of the estate descending to him did not exceed 300*l.*, of one half whereof the respondent Dame Margaret was to enjoy the life-rent.

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the party served heir be entitled to the provisions of that settlement. For, here the subtlety of law, that *bares est eadem persona cum defuncto* must yield to this undoubted principle both of law and equity, that he who has bound himself by a marriage settlement, which is always onerous as to the heir of the marriage, cannot voluntarily and gratuitously evacuate that first settlement; and it is certain, that so far as provisions in a second marriage-settlement are exorbitant they are gratuitous; and there were several precedents of the Lords of Session in the like case. It is not to be imagined that the appellant would make up a title, in order to give up to the children of the second marriage the provisions made by his grandfather in his favours, by his mother's marriage-settlement; and though by that settlement he was entitled to the estate, yet it was necessary for him to be served heir before he could call in question such deeds as were done by his father, tending to disappoint his succession, but that service gave him no further title to the estate than he had formerly.

The respondents contended, that it further appeared that he was served heir general, because in the inventory given up by him he had included the lands of Kincaigie, which were not settled upon him by his mother's marriage-contract, as well as the estate to which he was entitled by that contract. But the giving up inventory to the sheriff of the shire did not alter the nature of the service: the claim for the service recited that the appellant was to be served heir *cum beneficio inventarii* conform to act of parliament 1695, and that act requires no inventory to be made up at the time of the service; but only requires that such inventories, when made up, containing the whole estate of the deceased, should be recorded before the sheriff in the shire where the estate lies; and that they be again recorded in books, appointed by the Court of Session, that creditors may know what estate belonged to their debtor at the time of his death, and that his heir serving *cum beneficio inventarii* might be no further liable to his debts than the value of the estate in that inventory. The making of such inventory, therefore, could never subject the appellant to the gratuitous debts and deeds of his father; and more especially in the present case, for this reason, that Mr. Colvill, who formed the appellant's claim, and the retour of his service as the sheriff's clerk, and made up the inventory, neglected to order the same to be recorded in the books of Session, whereby the appellant lost the benefit of that law, and made no use of the inventory. And as the appellant had no benefit by giving up inventory of the lands of Kincaigie, it cannot subject him to the gratuitous debts and deeds of his father.

#### *Heads of the Respondents' Argument.*

The description of the appellant by his father and mother could not be any evidence that he was only to be served heir, as claiming a particular provision by the marriage-articles for that description was equally proper to a general service as heir of line, and is proper, if not necessary, in all services. Had the intention been only

only to serve the appellant heir of provision by virtue of his mother's marriage-contract, there had been no occasion for mentioning her to be the *first* wife, because an heir of provision has right to that provision, whether his mother be first or second wife: but since he was to be served heir of line, it was necessary to find, that his mother was the first wife, because otherwise he could not have been served heir of line. Though in the recital of the service he is described as son of his father by Magdalen Stewart, his first wife, yet in the service itself and retour of the jury, he is only found *legitimus et propinquior heres*, without referring to the marriage-articles or any other provision whatsoever, which could never have been done had the service been as heir of provision as the appellant contends.

Nor does it alter the case, that the infestment upon the contract of marriage, whereby it appeared that the lands were settled upon the appellant as heir male of the marriage, was produced; for the appellant being both heir of line and heir of the marriage, he might very well be served heir of line, as he was, whereby, besides his right to the lands provided to him by his mother's marriage-contract, he made a title to all other lands his father died seised of.

It was likewise the appellant's intention to serve himself heir of line; for otherwise he must have confined himself to the lands settled by his mother's marriage contract; but this he did not, for amongst the lands given up in the inventory, and to which he claimed right to succeed by virtue of this service, are contained the lands of Kincaigie. These were no part of the settled estate; and yet the appellant would now pretend, that he was only served heir of provision, which could never entitle him to those lands of Kincaigie, which were not settled upon him. This is likewise confirmed from this, that the appellant brought an action, as heir to his father to avoid and set aside a conveyance made of these lands to the respondents, the minors, by their father; but this could not be as heir of provision, for these lands are not contained in the settlement, and consequently he must have considered himself as heir general or heir of line.

When an heir has made up his right or title as heir of line, he thereby becomes by law universally liable to the payment of all the debts, and performance of all the deeds of the person to whom he is heir. The law never will allow him, after subjecting himself to that universal representation, to avoid any of his predecessor's deeds, especially where they are for valuable considerations, as the demands of the respondents are; being secured by articles before marriage, in consideration thereof and of a marriage-portion paid. And therefore since the appellant's service does give him a right to all his father's real estate, as well as that provided to him by his mother's marriage-contract, the consequence must be, that he must be as universally liable, as his title gives him an universal right; and therefore he is tied up from questioning the deeds in favour of the respondents made by his father, whom he thus claims under. This has always been the

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uninterrupted opinion of all lawyers, and thus the judges have determined.

Judgment,  
23 Feb.  
1718-19.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the two interlocutors therein complained of be affirmed.*

For Appellant, *Ja. Stuart, Tho. Lutwyche, Hum. Hendman*  
For Respondents, *Rob. Raymond, Will. Hamilton.*

*Vide* the case *Home v. Home*, No. 15. of this Collection. One remarkable difference between that case and the present is, that here the son in the inventory, (which nevertheless is said to have had no effect for his benefit) gave up lands which were not settled upon him by his father's contract of marriage. In the case of *Home v. Home*, there were no lands to succeed to but those contained in the contract of marriage, and settled upon the heir.

Case 51. William Scott of Raeburn, an Infant, by his  
Guardians, - - - - -

Fountain-  
hall, 28 Feb.  
1710.  
Forber,  
23 June  
1713.

Walter Scott of Harden, alias Highcheester,  
an Infant by his Guardians, - - - - -

Appellant;

Respondent.

9th March 1718-19.

*Tailzie* — A person receives right to an estate from his father, and the father wards executes a procuratory of resignation for an entail of the same, with prohibitory and irritant clauses, to himself in life-rent and to his father's heirs, and failing of him to the heirs male to be procreated of his own body, and failing them to other heirs of entail: This procuratory was registered in the register of Tailzies, and inhibition used against the grantor, but no charter or sasine taken thereon: It is found, that there being no actual onerous cause for making this entail, especially in favour of heirs to be gotten and born, and seeing it remained in the terms of a personal obligation without being perfected by charter or sasine, it was revocable by the grantor thereof, with consent of his father the first indultate.

SIR William Scott, the elder, of Harden, in the county of Berwick, had two sons, William and Robert, and two brothers, Gideon Scott of Highcheester, (the respondent's great grandfather) and Walter Scott of Raeburn, his youngest brother, (the appellant's great grandfather).

In March 1673, upon the marriage of William the son (who was then also Sir William) with Jane Nisbet, daughter of John Nisbet of Dirleton, Sir William the elder bound himself to settle the lands of Harden and others on Sir William the son, and the heirs male of his body of that marriage, whom failing to the heirs male of his body of any other marriage, whom failing to his heirs and assignees whatsoever. In 1674, a deed was executed by Sir William the father in terms of the said obligation upon which infeftment was taken by Sir William the son.

In May 1686 Sir William the son executed a procuratory of resignation for a new entail of his estate; at the date of executing the procuratory, Sir William the son was under the displeasure of the Government, and neither he nor his brother Robert had any issue; and the Earl of Tarras, son of Gideon Scott of Highchester, (who would have succeeded to the estate, failing issue of Sir William the son and his brother Robert,) stood forfeited for treason. By the said procuratory of resignation Sir William the son "for the well and standing of his house and family, and continuance thereof in the surname of Scott, and for certain good and onerous considerations, bound and obliged himself, his heirs and successors, to make due and lawful resignation of his estate in the hands of the superior in favour and for new investments thereof to be given to Sir William Scott the elder of Harden, his father; whom failing to the heirs male to be procreated by himself of his then present or any future marriage; whom failing to Robert Scott his brother, and the heirs male of his body; whom failing to William Scott of Raeburn," (the appellant's grandfather,) and the heirs male of his body; whom failing to the other heirs of entail therein mentioned, "the descendants of Sir Gideon Scott of Highchester deceased, both male and female, being always upon great and weighty considerations excluded and debarred from the succession in all events." By this deed Sir William Scott the younger reserved to himself his own life-rent of the whole entailed lands, and power to provide for a second lady by a jointure not exceeding 220*l.* 4*s.* 5*d.* sterling per annum, and the children of such second marriage with portions not exceeding 1666*l.* 13*s.* 6*d.* sterling. It contains a proviso, that it should not be lawful to the said Sir William Scott the father, and the other heirs of entail, alter the same or the order of succession, and in case any of them should attempt it, the deed should be void, and the person so doing should forfeit his right, and the next in substitution should be at liberty to enter; and it also contains a clause, that the same should be valid, though it should not be delivered by the grantor in his lifetime, but should be found amongst his writings after his death.

No charter or investment followed upon this procuratory; but, in the absence of Sir William Scott, the younger, from the kingdom, his father in January 1691, sent the said procuratory to Mr. Menzies, his agent, (who had drawn the same,) with a missive, desiring him to register it with all convenience and security, for delays might prove dangerous. And Mr. Menzies, in the same year, presented a petition to the Lords of Session for Sir William Scott the elder, and the other members of the entail, praying that the same might be registered in the register of entails appointed by act of parliament, which was accordingly ordered and done. Sir William Scott the elder, Robert Scott his son, and William Scott of Raeburn (the appellant's grandfather,) the three persons first named in the entail, used inhibition in 1691 against Sir William Scott the younger, to prevent his making

making any deed in prejudice of the entail. These steps were taken without the privity of the grantor, when he was out of the kingdom, and several years before his return.

After his return to Scotland, in 1698, the father and son executed a deed, reciting, That though Sir William Scott the younger had for particular reasons at the time subscribed the deed of 1686, yet the same was left to be further considered by him, and no ways to be made use of but when and as he should think fit; nevertheless that it was in his absence and without his order put into the public register, he being at that time out of the kingdom, and since both he and his father were resolved to discharge and make void the said deed, to the end that their succession might either run in the tenor of the former investments of their estate, or be ordered by a new settlement of the said Sir William the son; therefore they expressly declared the said deed of 1686 to be void and null, and that the succession to the estate should by no means be regulated thereby: and the said Sir William the father did thereby repone and restore the said Sir William the son in his full right and place of the premises as before the making of the said tailzie, which he for himself and all the other heirs of entail perpetually renounced in his favour.

In 1699 Sir William, father and son, raised an action of reduction improbation before the Court of Session against the heirs of entail for reducing the deed of 1686; in this action the defenders did not appear, and decree of certification was obtained, declaring that the deed so reduced if produced in any Court was to be looked upon as false and forged, and to bear no faith.

For some time no new settlement of the estate was made; but, in 1705, Sir William the son executed a new entail of the estate, proceeding upon the recital, that "Whereas I have a plentiful estate conveyed to me from my progenitors of the surname of Scott, which I am resolved to transmit and continue in the said name of Scott, for the lasting well and standing of my family in the said name in all time coming;" therefore he settled his estate to himself and the heirs male of his body, whom failing to his brother Robert and the heirs male of his body, whom failing to the respondent (grandson of the said Earl of Tarras, who was son of Gideon Scott, the said Sir William's eldest uncle) and the heirs male of his body, whom failing to Walter Scott of Raeburn (the appellant's father) and the heirs male of his body, whom failing to certain other heirs therein mentioned; reserving a power to Sir William the grantor to alter this entail. The principal difference between this and the deed of 1686, was, that the descendants of the Earl of Tarras, who were totally excluded in the former deed, were by this latter deed called to the succession in preference to the Raeburn branch.

Sir William Scott the father, Sir William the son, and his brother Robert, having died without issue male, the appellant was served heir to his grandfather William of Raeburn, the person next called to the succession by the deed of 1686; and thereupon an action was brought by him and his guardians before the Court

of Session against the respondent and his guardians, for reducing and voiding the deed of revocation executed by Sir William Scott elder and younger, and the said decret of certification, and also for avoiding the second entail. In this action the appellants insisted that the deed of revocation was void, because neither father nor son apart nor jointly had power to recal the former entail, for Sir William the younger was divested of the fee, and only remained life-renter, and as such could have no heir or successor, and consequently could not alter the succession; neither could Sir William the elder do it, because he had not an absolute but only a conditional right by the provisos of the entail; which among others were, that the descendants of Sir Gideon Scott (the respondent's great grandfather) should be excluded from the succession in all events; and that he should not alter the course of succession in prejudice of the heirs of entail, and if he should do in the contrary that such deed should be void; and they insisted, that the said decree whereby the entail, under which the appellant claims, was declared to have been false and forged, was null, the action implying a contradiction. For the pursuers in that action, in their deed of revocation, and in their libel, set forth that the entail was made by them and recorded as the law directs, and yet in the same libel they conclude that the same deed should be decreed to have been false and forged.

In this action the respondent appeared and made defences: and the cause being heard before the Lord Ordinary, his lordship, on the 18th of June 1712, "Repelled the allegation made for the appellant against the decree of certification, and found the said decree sufficient to exclude his title in that action;" and to this interlocutor his lordship adhered upon the 17th of February 1713. The appellant reclaimed to the whole Court, and their lordships, upon the 23d of June 1713, "Found that there being no antecedent onerous cause made or done to Sir William Scott the younger, of Harden, for making the former entail of his estate, especially in favour of heirs to be begotten and born, and seeing the said entail did remain in the terms of a personal right without being perfected by charter and sasine, it was revocable by Sir William the maker thereof, with consent of Sir William his father, the first institute, and is actually revoked by them conform to the revocation in process; and therefore found no need to advise the relevancy of the reasons of reduction proposed against the said decree, but assolizied from the reduction of the second entail and the said decree of certification simpliciter."

The appeal was brought from "several interlocutory sentences and decrees of the Lords of Session of the 18th of June 1712, the 17th of February and 23d of June 1713."

Entered,  
1 Dec. 1718.

*Heads of the Appellant's Argument.*

Sir William Scott the younger having divested himself of his estate without reserving any power to alter, and the entail being delivered

delivered to Sir William the father, as institute in the entail, and he having got the same recorded by authority of the Lords of Session, and served Sir William the younger with inhibition to prevent his making any deed in prejudice to the first entail, he could not thereafter recall or void the same at his pleasure.

The maker of a gratuitous or voluntary deed, whereby the grantor is divested of the fee has no power by the law of Scotland to alter it at pleasure, though no charter or infeftment followed thereupon. 1st, Any person may divest or oblige himself as firmly by a gratuitous deed, as by a deed for valuable considerations. 2dly, In this case the entail recites to have been executed for certain good weighty considerations and onerous causes, so that it was not gratuitous; for by the law of Scotland, an instrument or deed solemnly executed, containing any confession or declaration concerning matters of fact, proves fully against the subscriber of such instrument, which must the rather hold in this case; especially seeing, 3dly, The deed was made in favour of the father, from whom originally the estate flowed, and the other heirs of entail in their order, because their estates were entailed to the same line of succession that the estate of Harden was: So that the first entail is to be considered as a real and onerous settlement made betwixt the father and son, whereby they mutually agree to divest themselves of the power of altering, for preserving the estate in the line chosen by them. But, 4thly, By the course of decisions in Scotland mutual entails have always been admitted as onerous causes for each other: as, for instance, if Sir William Scott the elder and younger on the one part had settled the estate of Harden in default of issue male of both their bodies to the appellant's grandfather, and at the same time he had settled his estate of Raeburn in default of issue male of his own body upon the said Sir William Scott, and their issue male, these mutual entails would have been valuable considerations for each other, and could not have been altered by either party, and this was in effect the case. For the appellant's grandfather, in 1681, five years before Sir William Scott's entail was made, settled his estate upon his own heirs male, whereby Sir William Scott and his heirs male, would have succeeded in the course of succession before the grantor's heirs of line; and Sir William Scott elder and younger are subscribing witnesses to this deed of settlement: and that this was a consideration in making the first entail, does plainly appear from these words, which are part of the deed of entail, viz. "Because, he" (the said Sir William Scott, jun.) "knew their estates" "were entailed upon their heirs male, and that they would not" "alter these entails and course of succession therein set down," as in reality they have not done. But whether the first entail was gratuitous or not, it is equal in this case; for it is not denied that the second entail under which the respondent claims was gratuitous, and by the act of parliament 1621, c. 18. may be reduced at the instance of the heirs of the first entail, who, with respect to the heirs of the second entail, are lawful creditors. Though



no resignation or charter and infeftment followed upon the first entail, yet Sir William Scott having reserved no power to alter the entail, as is usual in all cases, when such reserved power is intended, was bound the moment he executed the deed of entail; and the making resignation, and taking out charter and infeftment thereon, concerned only the heirs of entail, but not the maker thereof, he having given a power to any person they should appoint, to surrender the estate, when the heirs of entail pleased; and though the said Sir William the younger had objected against such surrender, yet he could not have stopped it, and therefore the obligation must remain binding upon him and his heirs, who had no interest in the fee simple of the estate, except the foresaid reservations in favour of a second lady and children, which exclude all other reservations. For *exceptio firmat regulam in casibus non exceptis*.

By the following words of the act of parliament 1685, c. 22. 1685, c. 22.  
viz. "The original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto, and that a record be made in a particular register-book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, &c. and being so insert, his majesty, with advice and consent foresaid, declares the same to be real and effectual, not only against the contraveners and their heirs, but also against their creditors, compriers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles;" it is plain the entail is a real and effectual right after the same is exhibited before the Lords of Session and recorded as above.

It is plain Sir William Scott the elder had the entail in his possession, as appears from his letter to Mr. Menzies for recording the same, and Mr. Menzies's receipt for 3*l*. 8*s*. sterling as the fees thereof; and the Scots law presumes it was a delivered deed when it appeared out of the hands of the grantor; neither did Sir William the younger make any objection against the recording of the said entail for seven years thereafter, nor did he ever say that his father had indirectly got up the said deed of entail; and there is no doubt, if he had not delivered it to his father, he would have demanded his oath upon the way and manner how he got the same.

The appellant supports his case by the decision of the Court of Session, affirmed by the House of Lords, in the case of Sir John Shaw v. Dame Margaret Houston and Sir John Houston her husband, 10 March 1717-18: the words of the decree of the Court of Session are, that the irritances and clauses not to alter were binding upon Sir John Shaw, who made the entail then in question, even supposing Sir John Houston's lady to have been a gratuitous substitute or heir of entail. That case of Shaw and Houston was very much stronger than the present, for Sir John Shaw kept the entail in his own hands, and never perfected the same by charter and assent. 2dly, That entail was made in favour of himself, as the first institute with a power to alter; and the obligations or irritances

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this Collection.

tancies were only to commence upon the heirs of entail agreeable to the statute 1685. 3dly, Albeit Sir John Shaw's entail was made in a marriage-settlement, yet that did not alter the case; that settlement was no further onerous than in so far as concerned the wife and children of that marriage; the entail, in so far as it extended further, was a choice gratuitous and free; and yet the Court of Session in the one case decreed, that the two Sir William Scotts joining together could alter that entail, and in the other case, that Sir John Shaw was bound by the clauses irritant not to alter.

*Heads of the Respondent's Argument.*

The deed in question was not delivered, but on the contrary was intended not to be delivered, there being a clause in the deed dispensing with the not delivery in case of his death. It is true it was recorded, but that was done without either the order or privacy of the grantor: for these are the words in the deed of revocation. "It was" (meaning this deed) "in my absence and without my order put into the public register, I being at that time abroad out of the kingdom." This therefore can never be looked upon as a deed delivered by Sir William.

Though it contain no power of revocation, that is of no consequence, it being unnecessary, because by the law of Scotland, it is alterable of its own nature, being considered only as an intention or destination of succession to take place after his death, in case he should not make any alteration therein. This is the undoubted law of Scotland, and so it is laid down by the greatest lawyers of that country when writing on this subject: and the judges as often as any question of that kind has come before them, have so determined it, particularly in the case of Lord Lindores, where they found that a voluntary settlement, though under the strictest provisions not to alter, was still alterable at pleasure by the first maker. So that clauses of revocation are not of any use in deeds of this kind.

Though Sir William the maker, obliged himself to resign the estate, and make himself only liferenter; yet that resignation or settlement never was made, and the deed continued only in the nature of a declaration of what was then intended; which, as has been said, continued alterable at pleasure.

As to the case of Shaw and Houston; 1st, Sir John Shaw, who made the settlement, was expressly tied up from making any alteration; but in the case in question, there is no such restriction upon Sir William the son; these restrictions are only put upon Sir William the father, and the heirs substituted to him. Besides, though the deed of 1686 be called an obligation, yet the said Sir William the son was not bound to any other person; so that if it be to be called an agreement, it is only with himself, which shews it to be only in the nature of a will. 2d, In the case of Shaw and Houston the settlement was by marriage-contract, and was a solemn agreement betwixt different parties, publicly, and with the greatest solemnity executed and duly registered with consent of

Lord Lindores's case.  
Dalrymple,  
8 Dec. 1714.  
Bruce, 18  
Feb. 1715.

of all parties, and was made upon an onerous cause or valuable consideration. For Sir John Shaw the father, who was a party to that agreement, had quitted his liferent of the lands thereby settled, and had made several other provisions in view and consideration of that very settlement; but in the settlement in question there was no valuable consideration, no contract with different parties, but a *deed poll*\* containing a destination of succession not intended to be delivered, and made purely to guard the estate against the dreaded forfeiture. 3d, In the case of Shaw there was a power to the father and son to alter the same together, which shewed that the father had an interest in the covenant, but here was no other party, nor any other interest than that of the maker of the tailzie.

By the law of Scotland, no man can dispose of any estate of inheritance by will, but must do it by deed; should then the appellant's doctrine take place, that a man who once by deed obliges himself to make any voluntary settlement of his estate must pursue that and cannot alter it, the consequence would be, that no man could make any voluntary settlement but once in his life; which is attended with consequences too obvious ever to be received.

The deed whereby the appellant insists, that the respondent was excluded, was only made upon a certain view, on consideration of the circumstances of the family, as they then stood, which afterwards were altered; and that deed was not a contract or settlement, but only an intention to make one, which was never made, and the grantor was consequently at liberty to alter it in favour of the respondent his heir at law.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the said several interlocutors therein complained of be affirmed.*

Judgment,  
March 9.  
1718-19.

For Appellant, *David Dalrymple. Thomas Lutwyche.*

For Respondent, *Rob. Raymond. Jo. Pringle. Wil. Hamilton.*

*Vide* the case *Muirhead v. Muirhead*, No. 2. of this collection; where a disposition was found to be revocable even where infeftment had been taken thereon.

\* I retain this technical English expression, merely to mention what perhaps is not generally known in Scotland, that in England there are two sorts of deeds, *deeds poll*, and *deeds indented*: a deed *poll* is a deed consisting of one part only; a deed *indented* consists of more parts than one, and the parties to it interchangeably execute the several parts or copies. The latter is called an *indenture* because the top of it is indented or cut in an undulating shape; whereas a deed *poll* is cut straight or *palled*.

Case 52. John Arratt late Professor of Philosophy  
at St. Andrews; Appellant;  
John Wilson, Respondent.

23d March 1718-19.

*Trust.*—Circumstances inferring the trust of a disposition, bearing to be heritable and irredeemable, and upon which investment had followed.

The trust being declared, the trustee is ordered to continue in possession, until it be redeemed, or proved that he was paid.

After several interlocutors, holding the appellant as confessed for not appearing, the appeal is brought that he might be repayed to his oath, but the interlocutors are affirmed.

*Pro et contra.*—During the dependence of this process, the trustee having arrested the grantor of the disposition upon one of the debts paid by and assigned to such trustee, and while under caption having taken from the grantor a discharge and renunciation of all trust, and a disclaimer of his action of reduction: this discharge reduced upon the head of *pro et contra*; and the trustee is ordered to pay 60*l.* Scots of expences, before he should be heard in the principal cause.

*Cists.*—40*l.* costs given against the appellant.

**T**HE respondent brought an action of reduction and declarator against the appellant, before the Court of Session, for reducing a disposition granted by him to the appellant of the estate of Baikie and other lands, and for declaring that the same was granted upon trust only. The circumstances which gave rise to that action are stated by the respondent, as follows:

That Thomas Wilson the respondent's father being in his lifetime seized of, or having right to the estate of Baikie and other lands to the value of above 100*l.* sterling per annum, on which there were several adjudications, and other pretended incumbrances, the greatest part whereof were founded upon null and extinguished debts, agreed to settle the estate upon the respondent, on his giving security by bond, to pay his father and mother 200 marks Scots per annum during their lives, and the respondent and the appellant (who out of pretended friendship to the respondent did voluntarily offer to become bound with him as surety therein, and to whom the respondent gave a counter bond to indemnify) having granted a bond for payment of the said annuity, the respondent's father accordingly on the 29th of March 1709 executed a disposition of the said estate in favour of the respondent and his heirs:

That the appellant, whilst this agreement was transacting, having told the respondent, that he the respondent would never be able to carry on such suits, as would be necessary for reducing the said incumbrances, particularly against James Blair of Ardblair, to whom the greatest part thereof had been assigned, and against whom the appellant said that he had a personal execution, and could thereby force him to reasonable terms; and therefore proposed that if the respondent would colourably transfer his right of the said estate to him, he would not only carry on such suits in his

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own name, and disburse what money should be necessary for that purpose, but would also pay off any pressing debts, which the respondent owed, and take discharges for the same, and lend him money for carrying on his trade; and it was expressly agreed: that the appellant should not make any agreement with the said James Blair, or any other of the said pretended creditors, without the respondent's consent, and that upon payment of what money he should so really disburse for or lend to the respondent, with interest for the same, and being indemnified from the said annuity he should re-convey to the respondent; and the appellant declared he would take nothing for his own trouble, although the respondent offered him 1000 merks Scots on that account: that the respondent was by these means induced to accept of what had been so proposed by the appellant, and did accordingly sign a disposition of his estate to the appellant, bearing date the 30th of March 1709, the day next after the date of the respondent's father's said conveyance to him; but designed not to deliver the same, until what had been so agreed upon between the appellant and him should be put in writing. That the respondent's father being entitled to several debts and sums of money from the said James Blair, did at the same time for enabling the appellant to make the better terms with him for the respondent's benefit, assign the same to the appellant, who thereupon by a bond or writing of the same date, obliged himself to be accountable to the respondent's father, his heirs and assignees, for what should remain thereof after payment of the said Blair's just demands, and his the appellant's own charges: and, that the appellant afterwards got into his hands both the respondent's and his father's said dispositions of the estate, on pretence of shewing them to his lawyer, and promising to return them, which he never did perform; and that he might be master of the whole writings, he caused his agent, one Thomson to borrow up the same, whose receipt the respondent produced in process:

That the appellant did, indeed, at different times lend the respondent several sums of money, amounting in the whole to about 30*l*, for payment whereof the appellant gave him several promissory notes; and the appellant paid some small debts for the respondent, but, instead of discharges, he took assignments thereof to himself, and did also commence suits against the several pretended creditors, but soon agreed the matter with them, and particularly with the said James Blair, without the respondent's privity or consent: that these transactions having given the respondent just cause of suspicion, he pressed the appellant, that the said agreement between the respondent and him relative to the said trust should be put in writing; but this being shifted off for a long time, and at length refused, the appellant was obliged to raise the said action of reduction and declarator.

Soon after the commencement of this action, the appellant caused the respondent to be arrested for one of the said debts which had been assigned to the appellant, and the respondent while

while under caption signed a discharge of all things relating to the said trust, and a disclaimer of the said action.

The respondent having afterwards nevertheless proceeded in the said action, and referred the proof of the trust to the appellant's oath, he for that purpose exhibited several interrogatories for the appellant's being examined thereon, before the Lord Ordinary in the cause, one of which related solely to the manner of procuring the said discharge. The Lord Ordinary on the 9th of December 1714 "of consent of the appellant's procurators, without an act before answer, ordained the appellant to depone before him on the several interrogatories, and assigned the 15th of the same month for that effect."

The appellant did not give his deposition; but at next calling of the cause the appellant's procurators produced the said discharge, and insisted, that the whole process and effect thereof was discharged, and that therefore there was no occasion for the appellant's deposing. To this it was answered for the respondent, that the discharge was extorted, and that one of the interrogatories was with respect to the way and manner of obtaining thereof; and that, therefore, it ought not to be made use of against the appellant's being holden as confessed. The Lord Ordinary on the 17th of December 1714 "Held the appellant as confessed upon the several facts or allegations contained in a condescendence given in by the respondent; and in the mean time allowed the respondent to see the discharge produced by the appellant, and both parties to be ready to plead the import of the same at next hearing."

The respondent afterwards brought an action for reduction of the said discharge, and set forth the means by which he contended the same had been extorted from him. This was opposed by the appellant's procurators, who denied the reasons alleged for reduction thereof, and insisted that though they were true, they were not relevant; for what had been done therein was to compel payment of a just debt, and nothing could hinder the appellant from accepting a discharge that was just and reasonable in itself. The Lord Ordinary on the 21st of January 1715 "Found the reason of reduction relevant to be proved by the respondent, and allowed him a time for proving the same." The respondent having accordingly cited his witnesses, the appellant afterwards presented a petition for a conjunct probation, which being answered by the respondent, whose witnesses were then waiting to be examined, the Court on the 25th of February 1715 "Ordered the respondent's witnesses to be examined that afternoon, and granted to the appellant for examining his witnesses to the 5th of June following." The respondent's witnesses were accordingly examined, but the appellant examined no witness.

The Lord Ordinary having reported the proof which had been taken, the Court on the 30th of June 1716 "Found the reasons of *vis et motus* proved, and therefore reduced the said discharge, and decreed the appellant to pay to the respondent the sum

"sum of 60*l*. Scots of expences, before he should be heard further in the cause, and remitted both parties to be heard in the principal cause, after payment of the said 60*l*. Scots before the Ordinary."

The appellant then insisted that he might still be allowed to depone, since he had been deprived of the opportunity of doing it only by the shortness of the time allowed him for that purpose, and that there was no act extracted upon the interlocutor holding him as confessed.

The respondent stated that the appellant's not deposing and insisting upon a discharge which he had extorted during the dependence of the action, was a plain indication of the trust. The Lord Ordinary having reported the debate, the Court on the 25th July 1716 "Before answer as to that point how far the appellant was to be reponed against his being held as confessed, ordained him to give in before the Ordinary a condescendence of the *res gessæ*, and for what onerous cause the disposition was granted." The appellant not having given in such condescendence, the Lord Ordinary on the 27th of the same month "Adhered to the said interlocutor holding the appellant as confessed, and ordained him to denude himself of the lands in the said disposition, in favour of the respondent bearing all clauses necessary."

The appellant pleaded, that it being seven years since the disposition was made to him, it was impossible for him in two days to make up such special condescendence, or give an account how such onerous cause had been performed: but, after sundry proceedings, he gave in a condescendence of sums alleged by him to have been paid to the respondent and his father's creditors, amounting to 2784*l*. sterling, which, he contended, far exceeded the value of the lands; and he petitioned the Court still to allow him to depone, whether the disposition was in trust or not.

After answers for the respondent the Court on the 3th of January 1717 "Ordered the appellant to produce upon oath his whole writings with the grounds and vouchers thereof." And on the 1st of February thereafter, the Court "Found, that the holding the appellant as confessed upon the trust should not prejudice him of any debt, right, or diligence he had upon the estate, in as far as might be extended to the sums truly paid by him on account thereof, and remitted to the Lord Ordinary to proceed accordingly."

The cause coming to be heard before the Lord Ordinary, his lordship on the 13th of February 1717 "Ordained the appellant to produce the minute of agreement between the said James Blair and him, about the transaction, both as to the liferent escheat, and his pretensions on the estate of Baikie, for clearing what he paid for the same." And this interlocutor was adhered to by the whole Court on the 11th of June 1717.

The Court on the 9th of July 1717 "Found that the disposition made by the respondent and his father was redeemable by the respondent for the sums truly paid or undertaken by the appellant, and his necessary charges, and the interest of the  
" said

“ said sums and charges from the respective times of payment  
 “ thereof, deducting the appellant's receipts of the rents of the  
 “ lands, and other effects of the respondent and his father, from  
 “ the respective times they were received; and ordered the ap-  
 “ pellant to continue in the possession, until it be redeemed, or  
 “ proved that he was paid, and remitted to the Lord Ordinary to  
 “ proceed accordingly.”

The cause being heard before the Lord Ordinary, his lordship on the 23d of July 1717 ordered the appellant to give in an account, charge, and discharge, of his intromissions in terms of the act of federunt, by Thursday then next; but the time was afterwards enlarged to the 5th of November following. At a calling of the cause on the 13th of November 1717, the Lord Ordinary, on the appellant's craving further time for giving in his said account of charge and discharge, “ Ordered him to give in  
 “ the same by Tuesday then next, with certification if he failed,  
 “ he should be found liable to the penalty in the said act of  
 “ federunt.”

The cause being afterwards heard before the Lord Ordinary, he on the 21st of November 1717 “ In regard the appellant had  
 “ failed to give in his account of charge and discharge in terms of  
 “ the former interlocutor, and that the respondent had given in  
 “ an account of charge and discharge signed by him in terms of  
 “ the said act of federunt, held the appellant as confessed upon  
 “ the said account given in by the respondent, and found that by  
 “ the said account the appellant was satisfied and paid off all his  
 “ rights on the said estate, and therefore decreed the appellant to  
 “ denude himself of the said estate in favour of the respondent,  
 “ and declared in terms of the respondent's libel, and also de-  
 “ cerned the appellant to pay to the respondent 81*l.* 1*1s.* 4*d.*  
 “ Scots, being the balance of the said account.”

Entered  
 16 Dec.  
 1727.

The appeal was brought from “ An interlocutory sentence  
 “ of the Lord Ordinary the 9th of December 1714, and  
 “ from another interlocutor of his lordship of the 17th of the  
 “ same month, and from an interlocutory sentence of the Lords  
 “ of Session of the 30th of June 1716, and from an interlocutor  
 “ of the said Lords of the 25th of July following, and from an in-  
 “ terlocutor of the Lord Ordinary of the 27th of the same month,  
 “ and from the interlocutor of the Lords of Session of the 8th of  
 “ January and 1st of February 1717, affirming their former in-  
 “ terlocutors, and from their interlocutor and decree of the 9th  
 “ of July 1717, and also from an interlocutor of the Lord Or-  
 “ dinary of the 21st of November following.”

#### *Heads of the Appellant's Argument.*

The lands in question were purchased by the respondent's fa-  
 ther in 1667, from the Earl of Strathmore, the superior, for the  
 price of 95*l.* 13*s.* 4*d.* sterling; and the Earl reserved a feu duty  
 of 12 bolls of victual and 1*l.* 13*s.* 4*d.* sterling. The respondent's  
 father was, according to the laws of Scotland, denounced for not  
 payment of a debt, and having continued under rebellion for a  
 year,



year, his life-rent escheat fell to the superior. The superior granted the same to John Lyon, Esquire, who thereupon brought an action before the Court of Session, and in 1687 obtained judgment, whereby it was decreed, that the rents and profits of the respondent's father's real estate, during his life, did of right belong to Mr. Lyon the donatory; and in pursuance thereof, the tenants were ordered to pay their rents to him. The respondent's father being thus turned out of possession, and being considerably in debt, was obliged to retire to Edinburgh, 40 miles distant from his estate, and live privately there, having little or nothing to maintain himself and his family.

In these circumstances the respondent's father frequently applied to the appellant for relief, and pressed him to accept a conveyance of the inheritance of the said lands, subject to the claims of the superior's grantee, and likewise subject to his own debts, and to 200 merks Scots yearly to him and his wife during their lives. The appellant in pity to the circumstances of the respondent's father, did at last agree to his request, and accordingly the transaction took place by the dispositions first of the father to the respondent, and next day of the respondent to the appellant, which was followed with silence. The appellant did accordingly pay the debts chargeable upon the said estate, and the annuity to the respondent's father and mother during their lives.

By the act of the Scots parliament 1696, c. 25. no deed of trust can be proved but by writ or oath of party; and as, in this case, the respondent does not pretend to have a counter bond, or so much as a missive letter from the appellant, declaring the trust, so neither, as the appellant apprehends, ought he to have been excluded from the benefit of the said act of parliament by giving his oath, whether such deed was given to him in trust, or for an onerous cause, and especially seeing there was no decree extracted upon these interlocutors, nor could the appellant, as the circumstances of the case are, possibly appear to be examined upon oath, in so short a time as was at first limited; and he is willing still to make oath, that the said conveyance was absolute and not in trust.

#### *Heads of the Respondent's Argument.*

The appellant not having thought fit to answer upon oath to the interrogatories relating to the said trust, but suffered himself to be held as confessed thereon, and to rely wholly on the said discharge, which he had extorted from the respondent, would now vain be admitted to swear him out of his estate, on pretence that he was some distance from Edinburgh, and could not come thither to depone by the time prescribed. But this is entirely false, and never was suggested for more than two years and a half after his being so held as confessed. And though there has not been any proof made or offered on that account, he, upon the head only of his being excluded the benefit of the said act of parliament, by his not being admitted to depone upon the said interrogatories after his being held as confessed thereon, has brought his appeal for reversal of all the

the said interlocutory sentences : But the respondent hopes, that the same shall be sustained for the following reasons, which would have been sufficient to have proved the trust before the said act of parliament, viz.

There was no valuable consideration ; for as to what money the appellant lent to the respondent, and now pretends to have been part of the consideration, he always had the respondent's notes or bills for it ; whereas if it had been a purchase he would have taken discharges for the same.

As to the bond for the respondent's father's annuity the respondent was bound as principal, and the appellant only as security therein, and he had the respondent's counter bond to indemnify him ; and for his further security, an assignment of a decree against John and James Crichton, for about 80*l.* which manifestly implies a trust and not a purchase.

If it had been a real purchase and not a trust, there had been no occasion for the estates being conveyed first by the respondent's father to the respondent, and then by him to the appellant, which only served to make the respondent liable for his father's debts, whereas it might have been conveyed at once by the father to the appellant.

It is particularly to be observed, that the appellant has not at any time during the action pretended that he had given any obligation or covenant to indemnify the respondent or his father from these debts, the payment whereof the appellant would have to be the onerous or valuable consideration of his pretended purchase ; and the greater the burthen of debts was, the trust was the plainer, or the fraud the greater, since the respondent's father in his lifetime was, and the respondent still is, liable for these debts.

The respondent's father's assignment of the debts and claims which he had against the said James Blair to the appellant, and his, the said appellant's, giving a bond to be accountable to the respondent's father for the same, with the appellant's submission to an award for these claims, on behalf of the respondent and his said father do plainly denote a trust.

The method which the appellant took to get free of the action, by extorting the said discharge, does infer a trust ; for else, if he had not been conscious thereof, why should he be at so much charge and pains to get that discharge, and found his defence thereon, when by giving his oath at first, he might easily have acquitted himself of this process.

Judgment,  
23 March  
1718-19.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that all the several interlocutory sentences and decrees and affirmances thereof in the said appeal complained of be affirmed ; and it is further ordered, that the said appellant do pay, or cause to be paid to the said respondent, the sum of 40*l.* for his costs in respect of the said appeal.*

For Appellant.	Sam. Mead.	Will. Hamilton.
For Respondent.	Robert Raymond.	Bat. Turnbull.

Simon Lord Lovat, - - - - - *Appellant*;      Case 53.  
Kenneth Mackenzie, Factor and Assignee  
of the Creditors of Alexander Mackenzie  
late of Fraferdale, - - - - - *Respondent*.  
Dairymple,  
17 Dec.  
1718.

4th April 1719.

*Life-rent Escheat.*—An act of parliament, at the time of the rebellion 1715, having ordained persons summoned by the crown to appear before the Court of Justiciary, and find caution for their good behaviour under the pain of life-rent escheat, &c.; and the life-rent escheat of a person neglecting to appear, being adjudged and granted to a donatory; though there was no previous declarator, the rents are ordered to be paid to the donatory; but the creditors who were real at the time of the falling of the escheat are ordered to be charged on the estate in due course of law.

*Construction* of the acts of parliament 1 G. 1. c. 20. and 50. and 4 G. 1. c. 8. The act 1 G. 1. c. 50. having enacted that all persons who should be attainted of high treason, before the 24th of June 1718, should forfeit all estates which they were in possession of on the 24th of June 1715, or afterwards, to his majesty; and declared that every grant of such estate, or any part thereof made by his majesty, should be void: Under the prior act 1 G. 1. c. 20. a person's life-rent escheat being adjudged on the 13th of October 1715, is gifted away by the crown; he was afterwards attainted of high treason before the 24th of June 1718; but the gift of escheat is found to subsist, notwithstanding the provisos of the last mentioned act.

The vesting act 4 G. 1. c. 8. having declared the judgments of any court, relative to any claim out of a forfeited estate made since 24th June 1715, to be void; but containing a proviso in favour of the gift of escheat before-mentioned, the judgment given in this case was not voided by said act.

**B**y an act of Parliament 1 Geo. 1. c. 20. intituled “An act for 1 G. 1. c. 20.  
“encouraging all superiors, vassals, landlords, and tenants in  
“Scotland, who do and shall continue in their duty and loyalty  
“to his majesty King George” &c., it was, inter alia, enacted  
that from the 1st of September till the 23d of January 1715,  
the king's advocate or solicitor in Scotland, might upon a war-  
rant from his majesty apply to the Lords of Justiciary for an  
order to summon such persons whose names should be contained in  
the warrant, to appear at such time and place as his majesty should  
appoint, to find sufficient bail for their loyal behaviour; and in case  
of contempt or wilful disobedience, every person so charged  
should incur the pains of single and life-rent escheat, to be  
brought in for his majesty's use, and should be fined in 500*l.* and  
be liable to a year's imprisonment.

Alexander Mackenzie of Fraferdale, the husband of Emilia  
who took the title of Baroness of Lovat, was summoned to ap-  
pear before the Court of Justiciary; but having neglected to do so,  
judgment was given against him in terms of the said act upon the  
13th of October 1715. And he was also engaged in the rebellion  
that year.

By another act 1 Geo. 1. c. 50. intituled “An act for ap- 1 G. 1.  
“pointing commissioners to enquire of the estates of certain c. 50.  
“waitors” &c., it is, inter alia, enacted, that all the estates real

R. . . . . and

and personal, whereof any persons (who since the 24th of June 1715, had been attainted of high treason or should be attainted before the 24th day of June 1718, for any treason committed before the 1st of June 1716,) should be seized or possessed of, interested in, or entitled unto, on the 24th of June 1715, or at any time afterwards, should stand and be forfeited to his Majesty, his heirs, and successors, and should be deemed vested and adjudged to be in the actual and real possession of his majesty, without any inquisition for the use of the publick. This act contained a clause to the following purport; "and to the end the public may have the benefit of all the *forfeited or forfeitable* estates by this act vested or intended to be vested in his majesty, it is hereby enacted and declared by the authority aforesaid, that all and every grant, demise, lease, confirmation, restitution, assurance, and disposition whatsoever, made or granted, or to be made or granted by his majesty, his heirs, or successors, under the great seal of Great Britain, or under any his majesty's seals in England, or Scotland, or otherwise, of the same estates or any of them, or any part thereof, shall be and are hereby declared to be null and void to all intents and purposes whatsoever."

After the passing of this act, and whilst the said Alexander Mackenzie was in prison for being engaged in the rebellion, the appellant petitioned his majesty for a grant of the said *goal* penalty, and of the single and life-rent escheat, incurred as aforesaid. The appellant in his petition set forth, that the lands (which were the estate originally of the said Emilia) were worth about 500*l.* per annum, but very much incumbered with debts, so that it could not then be known what the clear produce might amount to, and that such a grant would operate thus: that if the said Alexander Mackenzie should elude justice, by not being convicted of treason, this grant would take place during his life; and that if he should be attainted, it would reach his personal estate at the time of the judgment against him for not obeying the summons, and the rent of his lands during his life, as far as the same should not be limited or restrained by any act of Parliament concerning forfeitures. On the 23d of August 1716, his then majesty, in consideration of the appellant's zeal and services in suppressing the rebellion in the north of Scotland, did by his grant under the privy seal, give, grant, and dispose to and in favour of the appellant what had so fallen by the said sentence against the said Alexander Mackenzie.

The appellant having entered to the possession of the estate of Lovat in consequence of this grant, he laid arrestments in the hands of the tenants for their rents; and arrestments having been also used by the respondent, the tenants brought an action of multiple pouding before the Court of Session, in which the appellant and respondent appeared for their several interests. Pending this action Alexander Mackenzie was attainted of high treason.

The respondent contended that no grant from the crown of the single and life-rent escheat could be in prejudice of creditors; especially

especially since the very act which gave these escheats to the crown did in several places shew the anxious care of the legislature to prevent any just and lawful creditors from suffering by the rebellion. And he referred to part of the preamble of the act, in these words, "And whereas in such conjuncture especially, it is most just to punish rebellious subjects, and at the same time to reward such as continue firm and loyal to his majesty's person and government." In proof of this intention of the legislature, he cited also the following clause in the act, "And because it is hard, that any creditor remaining in peaceable and dutiful allegiance to his majesty, his heirs, and successors, should suffer by the rebellion of his debtor, be it therefore enacted by the authority aforesaid, that no conviction or attainder on account of the high treason or treason above-mentioned, shall hurt or exclude the right or diligence of any such creditor remaining peaceable and dutiful for security or payment of any true, just, and lawful debt, contracted before the commission of any of the aforesaid crimes." And he contended, that though the *escheat* was not expressly named in the act, yet in the construction of law, the act was to be extended to such persons, who by it are brought under certain penalties by which loyal creditors would suffer prejudice, if the saving clause were not extended to them. And the rather in this case because the estate was the estate of the wife of Alexander Mackenzie, and could not be forfeited but for his life, and should the grant in favour of the appellant subsist, the creditors would be deprived of the only fund for their payment, which was the rents and profits of the estate during his life. He contended too, that Alexander Mackenzie having been convicted of high treason, his real estate became vested in the crown for the use of the public from the 24th of June 1715, which was long before the penalty of the life-rent escheat was incurred, being the 13th of October following; and therefore that the life-rent escheat, which was subsequent, could not be a burden upon the estate antecedently forfeited for treason; and since the law in general vested all estates, there was no reason to infer the exception of escheats. And he stated, that supposing the life-rent escheat had been incurred, yet it was absorbed by the following forfeiture arising from the attainder, or though the life-rent subsisted after the forfeiture, yet the same was to be understood to be given to the public.

The appellant was heard in answer to all the objections of the respondent, and the Court, on the 18th of December 1717, found that the escheat being given posterior to the act of parliament appointing commissioners, to enquire, &c. whereby the forfeited estates are vested in the crown for the use of the public, the rents of the lands in question are absorbed and comprehended in the forfeiture of the said Alexander Mackenzie; albeit the forfeiture was posterior to the gift of the escheat; and found that the rents of the said lands are thereby subject to the debts and diligences of the creditors preferably to the appellant." And

by another interlocutor on the 21st of December 1717, the Court "preferred the creditors to the donator, and decerned accordingly."

Entered  
2 Feb.  
1717-18.

The appeal was brought from "two several interlocutory sentences or decrees of the Lords of Session in Scotland of the 18th and 21st of December 1717."

4. G. 1. c. 8. After this appeal had been lodged, the creditors of Alexander Mackenzie presented a petition to the House of Lords, stating an act of parliament which had been passed also since entering the appeal; the act 4 Geo. 1. c. 8. intituled, "an act for vesting the forfeited estates in Great Britain and Ireland in trustees, to be sold for the use of the public; and for giving relief to lawful creditors by determining the claims," &c. By this act the trustees were empowered to hear, determine, and adjudge all and every claim and claims of the lawful creditors and other claimants upon the forfeited estates, and the determinations of the trustees were to be final, if the party claimant did not within twenty days enter his appeal to the Court of Delegates. By a clause in the said act it was enacted, "that all and every sequestration, suspension, arrestment, and other act and decree, made and passed by any Court of Judicature since the 24th day of June 1715, or which shall hereafter be made and passed otherwise than according to the directions of this present act, whereby any right, title, charge, or interest, into, out of, or upon any of the forfeited estates hath been or shall be decided and determined in favour of any creditors or person claiming interest therein, or whereby any person or persons have been or shall be entitled to possess any part of the said estates, real or personal, or to levy, receive, or discharge, any part of the rents and profits of the same by any such decrees or sentences, or without any lawful title, are hereby declared to be void, null, and of no effect, as if the same had never been made or passed."

This act contained a proviso to the following effect, "that nothing herein contained shall be construed to extend to, or in any way to invalidate or infringe a grant made by his majesty, and passed under the privy seal of Scotland, bearing date the 23d day of August 1716, whereby his majesty grants to Simon Lord Lovat the single and life-rent escheat and sum of 500l. penalty, incurred and forfeited to his majesty by Alexander Mackenzie of Fraserdale, on account of his disobedience and not appearing before the Lords of Justiciary, when summoned so to do, pursuant to the directions of an act passed in the last session of the present parliament, intituled, 'an act for enquiring all superiors,' &c. The petitioners therefore prayed, that the appeal should be dismissed.

The House made an order, that the creditors should be at liberty to be heard by their counsel on the matter of the said petition at the same time the cause was heard.

*Heads of the Argument of the Creditors on this preliminary Point.*

The appeal being brought to reverse those sentences which are since annulled and made void by the said act 4 Geo. 1. c. 8. the creditors hope the said appeal shall be discharged, especially since the appellant in the mean time continues in possession of the estate, and thereby deprives the creditors of their just debts and interest, which many of them want for their subsistence.

With regard to the proviso contained in this act in favour of the appellant; this proviso only relates to the grant, but not to any decree for or against that grant, which stands upon the foot of the law, as it was on the former act of parliament for the forfeitures. The appellant will, no doubt, be entitled to insist upon the benefit of his grant before the trustees, and will receive their determination, but this proviso will not be any prejudice to the respondents, who are lawful creditors.

His majesty's solicitor-general in Scotland being satisfied that the sole power of hearing and determining all claims relative to the forfeited estates, as well life-rent escheats as others, was by the last-mentioned act vested in the commissioners, exhibited a claim before the said commissioners, for and on behalf of the crown, for the single and life-rent escheats of all the persons, who had by virtue of the said act for encouraging superiors, &c. forfeited the same. These commissioners, on the 22d of September 1718, after hearing counsel on both sides, pronounced the following decree, viz. "That the real estates of the persons attainted and convicted were vested in his majesty, and are now vested in them as trustees for the use of the public, with all rights and titles thereto, as they stood in the forfeiting persons on the 24th of June 1715, free from the life-rent escheats claimed; and do therefore dismiss the claim as to the life-rent escheats." The solicitor-general appealed from this decree to the Court of Delegates, and they, upon hearing counsel the 30th day of December 1718, did "order and adjudge that the said appeal, so far as relates to the said life-rent escheats, be dismissed; and that the decree of the said trustees, with relation to the said life-rent escheats be affirmed."

No case for the appellant upon this preliminary point appears.

*On the Merits—Heads of the Appellant's Argument.*

The debts of the pretended creditors, who oppose the appellants have been contracted with a design to burden the estate, and bear date for the greatest part after the 24th of June 1715. These creditors joined in naming the respondent, Kenneth Mackenzie, (who had all along been factor and agent to Alexander Mackenzie, the forfeiting person) as their factor, to whom they assigned their pretended debts.

No law ever burdened single or life-rent escheat, with any other debt than that of the horning whereon it fell, and which was introduced by express statute; and therefore as the escheat in question

did not fall on account of any debt, no reason could be assigned why this grant should be burdened therewith; for though the lords of the treasury, by the king's allowance, have sometimes granted escheats with the burden of the rebel's debts, and for that purpose have taken bond from the grantees for payment thereof, yet this favour was never claimed of common right.

The respondents contended, that there having been no general or special declarator, before the appellant's grant passed, the same was not a good title for possession against personal creditors endeavouring to affect the life-rent escheat by arrestments. But on escheats being vested in the crown, his majesty's grant passing the exchequer and the seals is a sufficient title for possession, and a general or special declarator was not necessary either for completing his majesty's right, or establishing the appellant's title, especially in this case, where the solemn manner, in which the escheat in question was adjudged by sentence of the Court of Justiciary to be fallen, superseded the necessity of any such declarator.

With regard to the saving clause in the act of parliament for encouraging all superiors, &c. whereby it is provided, that the rights and diligences of just creditors shall not be hurt or excluded by the conviction or attainder of their debtors for high treason; that saving clause is limited and restrained to the case of forfeiture on conviction or attainder for high treason, and no way related to escheats, which are left untouched, to fall to the king, in the same extent, as they did belong to him before that act.

By the vesting clause in the act appointing commissioners to enquire, &c. the life-rent escheat in question, at the time of the grant thereof to the appellant, was not vested in his majesty for the use of the public: for although that act vests in his majesty, for the use of the public, the estates of persons attainted of treason, which they were seised of the 24th of June 1715, yet this life-rent escheat was vested in his majesty for his own use, before the attainder of the said Alexander Mackenzie for the treason, by virtue of an act for encouraging superiors and vassals; and by a clause in the said act of enquiry, it is expressly provided, that that nothing in that act should extend or be construed to extend to repeal, alter, or make void any of the provisions, matters, or things contained in the said act for encouraging superiors and vassals. And the vesting the life-rent escheats thereby fallen in the king for his majesty's use, and at his disposal, is one of the principal provisions and matters in the said last-mentioned act.

As the escheat and forfeiture for treason are the punishments for two different crimes, and the effects of two different causes, the first for the contumacy of Alexander Mackenzie, and the other for his treason; so if he had had a fee in this estate, which by his attainder for treason would have become vested in his majesty for the use of the public; yet there would have been two different estates in the king; the first a life-rent escheat vested in his majesty by the act for encouraging superiors and vassals for his own use, and the inheritance vested in him for the use of the public;



public; and therefore it would be a strange construction to have consolidated both these estates, which would have been vested in his majesty for different purposes. And it cannot be denied, but that if the said Alexander Mackenzie had not been so attainted, the right to the said escheat would still have existed in the appellant; and it would be strange to imagine, that the right so vested in him should by the attainder of the said Alexander Mackenzie, so happening afterwards, revert to his majesty, and be re-vested in him, and then consolidated with the estate forfeited by the treason for the use of the public; but, however, in this case Alexander Mackenzie had no fee in him to forfeit.

But it did not properly lie before the Court of Session, (as the appellant conceives) to determine and make void the appellant's said grant, as in effect they have done, at the instance of the respondents, whose pretended debts would not affect the said estate in the hands of the trustees; but their lordships ought only to have determined, whether or not the respondents ought to be paid their several debts out of the escheat lands in question, that so the appellant (who never refused the payment of any real debt affecting the estate) might have disputed the justice of any of the respondents' debts, and put them to make due proof thereof.

By a clause in the act 4 Geo. 1. c. 8. for vesting the forfeited estates in trustees, &c. (made since pronouncing the interlocutors appealed from) it is provided, that nothing in the said act contained shall be construed to extend to, or in any way to invalidate or infringe his majesty's said grant to the appellant, whereby the said life-rent escheat, notwithstanding any such pretended consolidation is well saved to the appellant.

(Subjoined to the appellant's case, he gives a list of the debts claimed by the respondents, with their respective securities and dates thereof.)

#### *Heads of the Respondents' Argument.*

Though Alexander Mackenzie was not attainted of high treason till some time after the date of the grant to the appellant, yet whenever that attainder took place, it was drawn back expressly by the act 1 G. 1. c. 50. to the 24th of June 1715, and as that was before the penalty of the escheat incurred, so this escheat is in the nature of every other charge, and could not affect the forfeited estate posterior to the time when that forfeiture commenced; and therefore since the estate of Mr. Mackenzie is declared by law to be forfeited from the 24th of June 1715, the succeeding penalty of the escheat could be no charge, and the same was vested in his majesty, independent of that charge, for the use of the public.

Though the grant to the appellant was prior to Mr. Mackenzie's attainder, yet it was posterior to the act vesting the estates in his Majesty for the use of the public; now should any grant be made posterior to that act, of any part of the estate so surrendered, it were eluding the act. Had Mr. Mackenzie never been forfeited, the grant might have been good, but when he was

attainted of treason, and that attainder drawn back to the 24th of June 1715, before the escheat fell, it must void that grant; for his Majesty having surrendered to the public the real estates of the rebels in the event of their respective attainders, whereby their estates were by law to become forfeited to his Majesty prior to the surrender, and by which their escheats were to be absorbed, it could not but be in view that they were to go to the public free of those burdens. For the surrender must be understood to be *pro omni jure*, especially as *beneficia principum* are to be interpreted in the most benign and ample manner.

It is still more evident, that these escheats, after the surrender to the use of the public, did not continue in the king, otherwise it would have been unnecessary for Lady Panmure, and others, to apply for acts of parliament to enable his majesty to make provision for them during their husbands lives, if their husbands life-rent escheats (which were all incurred in the same manner as Mr. Mackenzie's) had remained in his majesty.

The appellant founded upon a proviso in the act 1 G. 1. c. 50. for appointing commissioners, declaring that nothing in that act should extend to take away, repeal, alter or make void, any of the provisions, matters, or things, contained in the act for encouraging superiors. But this proviso is only in favour of the rights of superiors, vassals, tenants, creditors, &c. continuing dutiful and loyal to his majesty, but does not reserve any interest to the crown; and for this obvious reason, because nothing was or could be supposed to be in the crown, but what was made over to the public by the first vesting clause, which was to have its full effect from the 24th of June 1715.

2689. a. 33. By an act of parliament in Scotland 1689. c. 33. it is enacted, that no vassal or creditor, personal or real, shall be prejudged or lose any of their lands or estates, or any of their true and just sums remaining due to them, by their debtors' or superiors' forfeiture. And the crown never used to make any grant of these life-rent escheats to the prejudice of creditors; but on the contrary, the donators of such escheats have always been obliged to grant back bonds to be accountable to the creditors. Both from the recital and enacting part of the act for encouraging superiors, &c. it is plainly the intention of the parliament, that no forfeiture or conviction on account of treason should prejudice creditors: It never can be imagined, that a forfeiture arising from a smaller crime was to be extended to the prejudice of the creditors; that, in most cases, would have been a forfeiture of the king's loyal subjects, especially the respondents, who have no other fund of payment but these very rents.

The appellant himself did understand, that the escheat was to be charged with the debts, for in his memorial to his majesty, he sets forth the value of the estate to be 500*l.* per annum, but much *incumbered with debts*; it were then unreasonable for the appellant now to pretend to exclude these creditors.

After hearing counsel upon the petition and appeal of Simon Lord Lovat, as also upon the answer of Kenneth Mackenzie, and likewise

Judgment,  
4 April,  
1719.

upon the petition of the said Kenneth Mackenzie. It is ordered and adjudged, that the said interlocutors, sentences, or decrees complained of in the said appeal be reversed, and that the rents of the estate in question be paid to the appellant according to his grant; but that such debts of the creditors of the said Alexander Mackenzie as were real, and did by the law of Scotland affect the estate in question, at the time of the forfeiture of the life-rent escheat, be charged on the said estate in due course, according to the said law.

For Appellant, *David Dalrymple. Rob. Raymond.*  
For Respondent, (in both cases) *Edw. Northey. Will. Hamilton.*

William Morison, of Preston Grange, Esq; *Appellant*;  
James Smith of Whitehill, and David Bur-  
ton Glazier in Edinburgh - - *Respondents.*

Case 54.

8th April 1719.

*Society.*—The minutes of a meeting of a company, subscribed by the prefer, bore that certain members sold to another their shares of the joint stock at a given price; the person to whom the shares were so assigned afterwards, entered to the management of the whole concern, and applied the profits to his use; it is found that he was obliged to pay to each partner the sums mentioned in said minute, though it was objected, that the minute was erased in some sentences, and that there was *locus penitentie* till a more formal assignment was made.

The assignee is also ordered to free the assignors from the debts of the society, and pay them interest on the sums found due.

*Compensation.*—In a suspension, the suspender's plea of compensation is rejected.

*Costs.*—10*l.* costs given against the appellant.

**BY** articles of agreement, executed in March 1698, between the appellant, Sir William Binning, Patrick Steel, the respondents, and others, it was agreed to set up and carry on a glass-work in Morison's Haven, at their mutual expence, and to their mutual profit, and to consist of shares of 50*l.* sterling each share; and it was agreed, that if any of the copartners should be inclined to sell or assign his share, it should not be lawful for him so to do, until he should make the first offer thereof to some of the copartners, and if they should refuse, he might then sell, so as it were not at a lower value than what was offered by the said copartners: They were likewise by the said articles to appoint some of their own number to be overseers of the work; and they named George Livingston, one of the copartners, to be their cashier or treasurer.

By other articles of agreement in April thereafter, between the appellant and the other copartners, and Daniel Titterie, glass-maker in Newcastle, the said copartners leased to Titterie the said glass-manufactory and premises for 9 years, commencing at Whitsunday 1698. At a meeting of the copartners in September 1699, Sir Wm. Binning and Patrick Steel, two of them, surrendered their shares to the appellant, he paying to each of them

1*0l.*

10*l.* sterling yearly during the continuance of Titterie's lease, ~~and~~ they should be repaid what they had advanced of their shares; and it was then (as the respondents state) expressly agreed, that they who had purchased any shares should be liable for payment of all incumbrances these shares should be liable to.

The said glass-work was carried on amicably by the company till the 21<sup>st</sup> of October 1699; when at a meeting of the copartners a transaction took place, relative to a resignation by the respondents and one other of the copartners, of their shares to the appellant. In 1700, the respondents and the other partners brought an action against the appellant, before the sheriff of Edinburgh, stating, that among others the respondent Smith had paid in 100*l.* sterling towards carrying on the said manufactory, and the respondent Burton 76*l.*, for which sums they had got receipts from the said George Livingston, cashier to the copartners; that at the said meeting on the 21<sup>st</sup> of October 1699, the respondents, and one other of the copartners, resigned their shares to the appellant, he paying to each of them 10*l.* per annum, during the continuance of Titterie's lease, and after the expiration of the said lease paying what should then remain due upon the original shares, upon which terms the appellant accepted the same; and, that this, (as all the other transactions of the company were) was marked in the minutes of their sederunts, and signed by the president of the meeting: that the appellant having thus purchased almost all the shares of the manufactory, he took the sole management of the works upon himself, and on the last day of February 1700 granted a factory to one James Smith, to oversee, inspect, manage, act, and do as principal clerk, overseer, and accountant at Morison's haven, and uplift all debts owing to the said glass work, &c. and generally to do every thing concerning the premises as if the appellant were personally present. And their action concluded, that the appellant should be decreed to make payment of the several sums agreed upon. The sheriff, on the 2<sup>d</sup> of October 1700, decreed against the appellant for payment to each of the pursuers of 10*l.* sterling yearly, beginning the first year's payment upon the 21<sup>st</sup> of October 1700, and so on yearly thereafter until the term of Whitsunday 1707, when the contract with the said Daniel Titterie expired, and at that term the appellant to make full payment to each of them, of what should remain unpaid of their original shares advanced and paid in, among others, the respondent Smith's share being 100*l.* and the respondent Burton's being 76*l.* with the interest of the said sums, and to relieve the respondents of all debts contracted and loss sustained upon account of the said works, and further to pay 14*l.* Scots to each of the respondents for expences.

The respondents extracted the sheriff's decree, and gave the appellant a charge of payment; and he thereupon presented a bill of suspension to the Court of Session. When this cause came first to be heard, the Court, before determining the principal question, directed the respondents and the other copartners to condescend

condescend and instruct how the said copartnership was managed before, and how after, they renounced their shares; and ordained the appellant to condescend and prove if any part of the shares of the respondents (or other partners resigning) was unpaid, and what the same was; and if the said copartners had any effects of the said society in their own hands not accounted for, and what the same was at the time of their foresaid renunciation.

A proof was accordingly taken; the import of which as stated by the respondents was, that it appeared that before the time of the resignation of the respondents, the affairs of the said glass-manufactory were managed by a committee of the society in general, but after their resignations the appellant managed all by himself, and he alone gave a commission to Mr. Smith to act as overseer of the works; and Mr. Smith deponed, that as the commission was given by the appellant alone, so with him only he treated, and with no other of the society; and the appellant solely managed, bought and sold every thing of the said manufactory by himself, he only paid the charges and applied the profits to his own use. The appellant did not examine any witness to prove his allegations, and the term was circumduced against him.

The cause coming to be heard before the Lord Ordinary, his lordship in 1705, found it instructed by the writs produced, "that the respondents had paid their shares, and allowed the appellant, notwithstanding of the circumduction of the term, to prove by the respondents' oaths the having of any writs or books belonging to the society, and ordained the respondents to produce any such as they should acknowledge by their oaths, but found it not clearly proved by the respondents' renunciation, and the appellant's acceptance, that the appellant was obliged to release the respondents of the debts of the society, unless the same be instructed *aliunde*."

About this period Livingstone, one of the partners, made over his claims to the respondent Burton: the action was afterwards discontinued for upwards of ten years; but being again revived, the Court, in absence, gave judgment against the appellant, confirming the original decree of the sheriff of Edinburgh. The respondents thereupon gave him a charge of payment; and arrested the rents in the hands of his tenants. They also brought a process of forthcoming: and in that action, the appellant appeared for his interest. The Court in June 1717 adhered to their former decrees, and ordained the tenants to make payment in terms thereof.

The appellant presented another bill of suspension, contending that he and his tenants were forced to pay these sums without any legal proof of their being due; and he produced bonds and other writings by which, he contended, it appeared, that the respondents were at the same time debtors to the appellant in far greater sums than those claimed by the respondents. The Court on the 12th of July 1717 found it proved, that the shares of the  
above

above "glaswork belonging to the respondents were by them sold to the appellant on the 21st of October 1699, and that the said shares were bought and accepted at that time by the appellant, and were thereafter managed by him as his own, and remitted to the Lord Ordinary to hear upon what further remained to be determined."

The appellant reclaimed, and after answers for the respondents the Court on the 14th of November 1717, "having considered the said cause with the sederunt of the partners of the 21st of October 1699, and the factory granted by the appellant in 1700, to the said Smith, found it proved that after the said sederunt, the appellant acted and managed as proprietor of the shares in the said glaswork, which belonged to the respondents; and therefore found that the appellant was obliged to accept of the disposition of the said shares, and that he was obliged to make payment to the respondents in terms of the said sederunt, and decerned accordingly." And to this interlocutor, the Court adhered on the 27th of December 1717, and the 15th and 21st of January 1718.

Entered,  
3 Feb.  
1717-18.

The appeal was brought from "a decree of the sheriffs of Edinburgh of the 2d of October 1700, and of two several interlocutors of the Lords of Session of the 12th of July, and 14th of November 1717, and others in the cause."

#### *Heads of the Appellant's Argument.*

The respondents contended, that they had proved their resignations, and the appellant's acceptance thereof, both by an act of sederunt, or meeting of the company, and by the depositions of some witnesses. But that pretended meeting consisted chiefly of the respondents, who had entered into a concert to withdraw at the same time, and the depositions are of the same sort; besides the pretended act of the meeting is such as never was offered in evidence in any court, being crossed and cancelled in whole paragraphs; which if it had been ever so regular, could never have bound the appellant, unless he had either signed his acceptance at the same time, or had had the shares made over to him, by deeds in writing, as is usual in matters of consequence, by the law of Scotland, before which there is *locus penitentie* allowed in any treaty or agreement.

Had it been proved (as it never has) that the respondents had resigned, and that the appellant had accepted regularly, yet it appears very unjust to have allowed the respondents all the sums that they themselves asserted they had advanced for the works, without any proof of such advance; and before clearing off the debts due by the company, and before they had accounted for the product of the manufactory, proved to be in their own hands at the time, as public officers of the company and otherwise; and before any account of the partnership was taken or stated.

The said decrees ordained the appellant, not only, to pay the aforesaid sums, but likewise interest for the same, whereas there

there is no interest due upon any sums, except where the same is stipulated by the parties, or ordered by express law; especially where the account is not liquidated.

It appeared in court by bonds and other authentic documents, that the respondents were debtors to the appellant in far greater sums than those claimed (had they been ever so just) and so these claims were *ipso jure* extinguished by compensation.

The respondents objected, that compensation is denied by act of Parliament, if the same be neglected to be proponed by the party before the decree be entered; which being the appellant's case, he therefore could not have the benefit thereof. But the first decree complained of was in the appellant's absence, when he was engaged in the service of the government; which was the reason of his preferring so many bills of suspension afterwards, in which he fully instructed his grounds of compensation, and even where the law denies compensation, in most cases it allows of retention to stop execution, being matter of discharge, especially where it is evident, as in this case. Where a person having a ground of compensation, is refused the same, it is in effect likewise to refuse all action upon the ground of debt, be it ever so just, because the party against whom the compensation was to operate may not be able to allow satisfaction any other way. 1592.c.243.

#### *Heads of the Respondents' Argument.*

The appellant contended, in the court below, that the original contract of co partnership was blank in several particulars; especially as to the quantity of capital stock, and that the writer and witnesses were not designed, which was necessary by law. But this being a contract in relation to merchandize *is uberrimæ fidei*, and the solemnities in other writings are not required in such deeds; especially where the same have been followed out by several parties, by acting according to the same; and as to filling up the capital stock, that could not be, since it was not certain how many sharers or subscribers they might have.

With regard to the obliteration of the minutes of federunt founded on by the appellant; there is no question, but the federunts of all companies or societies, when legally signed, are probative for or against any member of the society, especially such as were present, who, if any thing material had been omitted, had an opportunity of having it rectified; and in this case there was no direction for any writing more solemn to be made use of where the shares of the society were transferred from one partner to another. And the appellant certainly looked upon this resignation as marked in the minutes as sufficient, since he after that time took upon himself the sole management of the glass work, without ever consulting the respondents, or the other resigning partners, and did likewise under his hand declare, he had right to the respondent Smith's share; and he had no other right but the resignation made in the said federunt. The obliteration was only of two protests taken by the appellant and the respondent Smith.

as to the method of management, through which a line was drawn as unnecessary after they had agreed to resign their shares.

The appellant objected, that the respondents had not paid up their shares: But that they had, appears by the receipts of the treasurer to the society, who was legally authorized to receive the same.

He objected also, that the respondents ought to bear their proportion of the debts owing by the co-partnership prior to their resignation: but it were very unreasonable, that the respondents should be answerable for the partnership debts, since they had upon terms parted with their shares to the appellant, who upon that account got all the co-partnership stock into his hands, which must and ought to be the fund for payment of these debts.

Judgment,  
8 April  
1719.

It is ordered and adjudged, *That the said petition and appeal be dismissed; and that the decree and interlocutors therein complained of be affirmed: and it is further ordered, that the said appellant do pay, or cause to be paid to the said respondents the sum of 20l. for their costs in respect of this appeal.*

For Appellant, *Tho. Lutwyche. Pat. Turnbull.*  
For Respondents, *Rob. Raymond. Will. Hamilton.*

Cafe 55. William Brown, Merchant in Edinburgh,  
Stair,  
25 Feb.  
1669.

and Andrew Rofs, Master of the Wool-  
len Manufactory at Musselburgh, *Appellants;*  
Robert Earl of Morton, *Respondent.*

3 Feb. 1719-20.

*King's annexed Property.*—A person, to whom part of the annexed property had been granted, creates a heritable security thereon: his grant is afterwards reduced, and the decree confirmed by an act of reannexation: an act of disannexation is subsequently made, and a new grant of part of the premises passed to the representative of the family of the original grantee, though not his heir: this does not revive the heritable security granted by him.  
*Costs.*—60*l.* costs given against the appellants.

THE lands and lordships of Orkney, Zetland, and the Isles thereto belonging, formed part of the annexed property of the crown. In 1643, King Charles the 1st, being indebted to William then Earl of Morton, in divers sums of money, lent to and disbursed for his majesty, by charter under the great seal of Scotland, granted and conveyed to the said earl and his heirs, the Isles of Orkney and Zetland redeemable on payment of 30,000*l.* sterling. By virtue of this charter the earl was infeft; and the said grant was ratified in Parliament: but no previous act of dissolution was obtained.

In 1647, the said earl and Robert Lord Dalkeith his son, granted an heritable security over the said Isles, to Sir William  
Dick



Dick of Braid, and Sir Andrew Dick his son, for securing repayment of 5570*l.* sterling lent to the earl. And upon the earl and his son's resignation, a charter was procured by Sir William and Sir Andrew, under the great seal, upon which they were duly inset. Upon the credit of this heritable security Sir Andrew Dick contracted several debts, and gave provisions to his children out of the same.

In 1662, King Charles the 2d made a general revocation of all grants made by any of his predecessors of any part of the annexed property of the crown; which revocation was confirmed by Parliament. Soon afterwards his majesty made a new grant of the foresaid Isles to the Viscount Grandison, for the honourable aliment, support and dignity of the family of Morton. But in 1668 an action was brought by his majesty's advocate, in the Court of Session for reduction of the grants which had been made of the said Isles, upon the ground that they were part of the annexed property of the crown, and that the king could not alienate or grant away the same, but for good causes first advised in Parliament, nor till after an act of Parliament obtained for disuniting the said possessions from the crown. In this action decree of reduction was accordingly obtained, and that decree and all the acts of annexation were afterwards ratified and confirmed by an act of Parliament 1669. c. 13.

Sir Andrew Dick and his children being thus defeated of their security upon these lands, made their application to his majesty king Charles the Second for subsistence, till his majesty should grant a reference for accommodation of the principal sum on the said heritable security; and the king made an allowance to them of the yearly sum of 122*l.* sterling out of the exchequer of Scotland, still reserving the consideration of the said principal sum. This allowance was, upon the recommendation of their case from the Parliament of Scotland, continued to them by king William, and afterwards by queen Ann, till the union.

In 1693 and 1702, James late earl of Morton applied by petition to the Parliament of Scotland complaining of the said decree, and praying that the same, with the act of Parliament ratifying that decree, might be reversed; but his petitions were rejected, and he obtained only recommendations to the crown to consider the hardships complained of.

In 1707 another application was made by the late earl of Morton to the Parliament of Scotland, representing the misfortunes of his family, and praying, for the preservation of an ancient house, which he was willing to owe to the queen's bounty, that her majesty might be empowered to make him a new grant of the premises. Her majesty having signified her satisfaction that such an act might pass, an act was accordingly passed in the Parliament of Scotland, reciting the earl's former applications and the recommendations of the Parliament thereupon; and "that her  
" majesty having considered the same; and being convinced of  
" the hardships and stretches therein mentioned, whereby the  
" earl and his family were very greatly lesed, and being willing  
" to

“ to shew at once a mark of her royal justice and favour to the  
 “ said earl and his family; therefore her majesty with advice  
 “ and consent of the estates of Parliament, did dissolve from the  
 “ crown all the said earldom of Orkney and lordship of Zetland,  
 “ and lands thereto belonging, to the effect her majesty might  
 “ dispoise to the said earl of Morton, his heirs and successors, the  
 “ said earldom, lordship, and lands, or any part thereof, redeem-  
 “ able by her majesty and her successors on payment of 360,000l.  
 “ Scots money, the said earl paying yearly to her majesty and  
 “ her successors, during the not redemption, 6000l. Scots money  
 “ in name of feu farm, and 1600l. Scots money to the mini-  
 “ sters of Orkney.” Pursuant to this act of Parliament, her  
 majesty gave part of what was contained in the first grant to the  
 earl under the said rent-charge, and several other burdens; and  
 the grant was ratified in Parliament.

The representatives of Sir Andrew Dick, conceiving that this  
 grant revived their right to the heritable security on the premises,  
 and rendered the grantee liable to make satisfaction for that debt,  
 his daughter, Elizabeth Dick, being a creditor to her father by a  
 bond of provision for a considerable sum of money, and James  
 Dunbar, her husband, obtained a decree of adjudication, on  
 the ground of the said heritable security. Having after-  
 wards assigned this adjudication and all their right to the ap-  
 pellants, they thereupon brought an action of mails and du-  
 ties before the Court of Session against the tenants of Orkney and  
 Zetland, to compel payment of their rents to the appellants.

The said James, late earl of Morton, appeared and made de-  
 fences to this action. Pending the action he died, and his bro-  
 ther, the respondent, was made party thereto.

The Court, on the 29th of January 1718, found, “ That the  
 “ said act of dissolution, and queen’s gift, proceeded and was  
 “ granted *per modum gratie*, and not *modum justitie*; and there-  
 “ fore found, that the right granted by the earl’s predecessors in  
 “ favour of Sir Andrew Dick, did not thereby revive, and re-  
 “ mitted to the Lord Ordinary to proceed in the cause accor-  
 “ dingly.” And to this interlocutor the Court adhered on the  
 21st of February thereafter. The cause being called before the  
 Lord Ordinary, his lordship, on the 28th of February, “ pre-  
 “ ferred the said earl on the rights produced to the mails and  
 “ duties libelled.” The appellants having reclaimed, the Court,  
 on the 17th of June 1718, “ refused the desire of the petition,  
 “ and adhered to the Lord Ordinary’s interlocutor.”

The appeal was brought from “ several interlocutory sen-  
 “ tences, or decrees, of the Lords of Session in Scotland of the  
 “ 29th January, and 21st February, and also from an interlo-  
 “ cutor of the Lord Ordinary of the 28th of the same February,  
 “ and from another interlocutor of the said Lords of the 17th of  
 “ June 1718.”

Entered,  
 18 Dec.  
 1719.

*Heath*

*Heads of the Appellants' Argument.*

It appears by the nature and tenor of the earl's new grant, that it was a restitution to the rights of his predecessors, and that by way of justice, since the act expressly mentions, that her majesty was convinced of the hardships and stretches done to his predecessor, by the decree in 1669, and the act following thereon, *whereby he and his family were very greatly lesed*, and was willing to do an act of justice as well as favour to the said earl, so that it could no way be properly called an act of mere favour. The earl having claimed and got back the estate of his predecessors, upon a narrative of hardships and injustice done to them, he cannot by this new grant exclude and bar the appellants, whose debt was so fairly contracted and secured to them by the said heritable right and infestment, whilst the right of the said estate was in the person of his predecessor. The said earl's grant could only subsist upon the head of justice, and not of favour, because by the said act in 1669, whereby the said estate was annexed to the Crown, it is expressly declared, "That if at any time thereafter it should be thought fit to dispoise or grant any right to any part of the said earldom and lordship, the general narrative of good services, weighty causes and considerations, should not be sufficient; but the particular causes and considerations whereupon his majesty and his successors might be induced to grant, and the estates to consent to such rights, should be expressed, and that all dispositions which should be granted contrary to that act should be void and null." So that unless the said earl's new grant proceeded upon some other grounds than mere favour it could not be effectual to him.

*Heads of the Respondent's Argument.*

The appellant's demand might have been a charge upon the premises, in the hands of the first grantee, who was the original debtor; yet that will not charge the respondent, who is not representative of the said grantee, nor has any estate or effects descended from him. If he were such representative, no doubt he must have been liable by virtue of the personal obligation of the said Earl William to pay the money; and though the respondent be in possession of the premises, yet it is not as claiming under the first grantee, but by virtue of a free gift made by her late majesty, with consent of the parliament of Scotland, to the said James Earl of Morton, deceased.

The act of parliament, which is the foundation of the respondent's late grant, does mention hardships and stretches used against the earl's predecessors by a rigorous execution of the law, but does not speak of injustice, or say that the decree of 1669 was contrary to law, nor does it reverse or set aside that decree; and though it might be a hardship and stretch of the law in making void a right granted to the Earl of Morton for a valuable consideration of money lent as well as for good services done to the Crown, yet still the law stood against the grant, and no injustice

was done. Though her majesty was to shew a mark of her royal justice as well as favour, that justice was not exercised in setting aside the decree of 1669, but in her consenting to the act of dissolution of the premises from the Crown, to enable her to reward the services done by an ancient family.

The act ratifying the decree of 1669 is reduced only in so far as it might be prejudicial to the grant to be made. that is in so far as that act did annex the premises to the Crown, but not in so far as it ratified the decree; and, therefore, that decree stands unreversed to this day; and of consequence the first grants made to the Earl of Morton in 1643 and 1646, and the heritable security founded on by the appellants, are void, and not revived. If the parliament, in 1707, had intended to reduce the decree in 1669, they would have proceeded in a judicative way, and the Crown would not have been enabled to make a new grant of the whole or a part of the premises, but the old one would have been revived. In fact however the whole estate contained in the old grant was not given; the office of admiralty, certain jurisdictions, superiorities, &c. are reserved, and what is given is under the rent charge of 500*l. per annum*; whereas no more was payable by the tenor of the old grants, than a silver penny if demanded.

If the old grant had been revived by the new grant, it would have been so far from being a royal favour to the Earl, that it must have been of very great prejudice to him; since not only the premises would have been quite exhausted by the growing interest of this pretended heritable security from the year 1647, but the Earl's other estate would likewise have been subjected to the payment of the appellants' debt by his very using of the new grant.

The reason of the caution in the act 1669, founded on by the appellants, is plainly expressed, that it may appear the same is not granted through importunity, &c. So the act does not prohibit or lay a restraint upon the Crown's making a voluntary grant, but only that any grant to be made should proceed upon special causes and motives; and if these be not expressed in this act 1707, it is hard to say where to find them, and the act has taken care particularly to recite them.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutors, sentences, & decrees therein complained of be affirmed. And it is further ordered, that the appellants do pay or cause to be paid to the respondents the sum of 60*l.* for his costs in respect of the said appeal.*

For Appellants, *Tho. Lutwyche. Tho. Reeves.*

For Respondents, *Rob. Dundas. Rob. Raymond. Sam. Mearns.*

Judgment,  
3 Feb.  
1719-20.

Sir Robert Gordon, of Gordonstoun, Bart. *Appellant*;      Case 56.  
James Brodie of Brodie, Esq;      -      -      *Respondent*.

8th February 1719-20.

*Process—Incident Diligence.*—In mutual actions relative to the property of a common, several witnesses on both sides, are examined upon an act and commission; and upon a second diligence others, who had not before appeared, are also examined: one of the parties gives in a new list of witnesses, praying a new act and commission, and to have some witnesses re-examined on commission who had already deposed before the Court; but his petition is refused.

*Costs.*—30*l.* costs given against the appellant.

THE appellant was proprietor of the lands of Drainie, and the respondent of the lands of Kinnedour, in the county of Moray. Adjacent to the several estates was a piece of moor and meadow land, called the moor of Drainie, to which both parties claimed a right. The respondent and his tenants being prevented by the appellant from pasturing the same, the respondent brought an action against the appellant before the Court of Session to have it declared that the said moor and meadow land were pertinents of his lands of Kinnedour, at least that they belonged to him in common with the appellant: and the appellant thereupon brought a counter action to have it declared that the contested ground was a pertinent of his lands of Drainie, that the property thereof belonged solely to the appellant and that the respondent and his tenants might be enjoined not to disturb his possession of the same. It appears that the respondent's summons had been first dated, but that the appellant's was first executed.

After both parties had produced in Court the several charters, infeftments and other writings by virtue of which each of them claimed, the Court, before determining the import of these writings, by interlocutor on the 14th of February 1718, "allowed both parties to prove by living witnesses by whom and in what manner the controverted lands had been possessed, for some time past, and with consent of parties granted a commission to" certain persons "to take the oaths of such witnesses as the parties should think proper to bring before them upon the ground of the controverted lands to give evidence in the said matter, and ordered their depositions to be brought into court the first of June following."

Several witnesses were summoned by both parties and deposed upon the contested premises. All the witnesses who were summoned not having appeared, both parties obtained in July 1718 an act, ordering those who had not appeared to come and make oath before the Court. Some of the respondent's witnesses were accordingly examined before the Court, and the appellant afterwards presented a petition, setting forth that he had received information of some old witnesses who might be privy to several facts in question, of whom he was before entirely ignorant, and some of whom had been abroad, and had returned home since the execution of the

original act and commission; and he prayed the Court to grant a new act and commission for examining the new witnesses (whose names were annexed to his petition,) and likewise to re-examine some of the witnesses already examined, some of whom had been examined before the Court; and the appellant agreed to have the act and commission reported before expiration of the time already allowed for examining witnesses. On the 24th of July 1718 the Court "refused the desire of the appellant's petition."

The appellant reclaimed: but the Court on the 29th of July 1718 also "refused the desire of the petition."

Entered,  
7 Jan. 1718-  
39-

The appeal was brought from "two interlocutory sentences or decrees of the Lords of Session of the 24th and 29th days of July 1718."

#### *Heads of the Appellant's Argument.*

When, by the law of Scotland, liberty is given to both parties to examine witnesses, and a commission is granted for that purpose, the examination is not closed by the return of the commission, nor is either party barred from adducing further proof until there be an order of the Court for that purpose, which is called a circumduction of the term: and such an order is necessary before the Court proceed to give judgment, or determine upon the evidence. But no such order was made in this cause, and therefore the appellant ought to have been indulged in what he applied for.

Though regularly all the witnesses ought to be examined, when the commission is executed, yet if new witnesses be discovered, whereof the appellant was entirely ignorant when the commission was executed, it would be very hard if he should be deprived of the opportunity of examining these witnesses, so lately come to his knowledge, or such of them as were out of the kingdom, and whose residence he was not at all acquainted with till after the execution of the commission. It has therefore been almost the uninterrupted course of the Court of Session to come into such a motion. Lord Stair is an express authority for this: he says: "Yet by supplication for more witnesses, in place of these that are dead, or out of the country, or for witnesses new come to knowledge; the party deponing that they are come to knowledge since the former diligence, will get a diligence against these other witnesses." If a new diligence be to be granted in any case, it ought to have been in the present; where the appellant was but lately come of age.

B. 4. Tit.  
46. § 6.

The Court of Session have been almost in constant use to grant such commissions, and particularly in two cases very lately; the one was *Saith v. Heirs of Kinnaird*, where upon an application by a petition from the pursuer, the Court, after witnesses had been examined, granted liberty for summoning new witnesses not formerly cited, and for re-examining some witnesses who had been formerly examined. In the other, *The Earl of Marchmont v. The Earl of Home*, the Court did the like. So their Lordships, both before and since the appellant's application to them, have granted to others what they refused to him.

29 Nov.  
1718.

This

This ought the rather to have been granted, since the appellant agreed to have the witnesses examined and the commission returned, before lapsing of the time granted to the respondent for the examination of his witnesses.

*Heads of the Respondent's Argument.*

No new discovery of witnesses proceeded from the depositions of those already examined, nor was it so pleaded for the appellant in the court below. He had formerly summoned thirty-five witnesses to give evidence in the cause, many of them his own tenants, who had lived long near to the controverted lands, and as many of them as the appellant thought proper to examine, have made oath upon their knowledge of the limits and boundaries of the ground in dispute, and how the same was possessed by the respondent and his predecessors. The appellant too had a second diligence allowed him against such of the witnesses as had not appeared upon the first, and these were brought to Edinburgh, and deponed before the Court. But their not proving the allegations of the appellant, was the true reason of his petitioning the Court for leave to bring in fresh evidence: and the appellant had not been straitened in point of time, for after his action came before the Court of Session, he had eight months to summon such witnesses as he thought fit.

The appellant contended, that some of his witnesses who had deponed, had not been examined, concerning several facts, which it appeared by the oaths of his other witnesses that they had particular knowledge of; and therefore those ought to be re-examined upon the ground of the controverted lands, and a commission or warrant granted for that purpose. Though the Court indeed sometimes in extraordinary cases have directed evidences to be re-examined in their own presence, for clearing any point that might be doubtful in their oaths; yet they never allow witnesses, who had deponed before the Court, to be re-examined upon a commission. Three of the witnesses in question were then also in Edinburgh.

After a pursuer's own evidences have deponed, and he has an opportunity of seeing the testimonies of the evidences brought in for the defender, the Court never allows the pursuer to bring in more witnesses than he has at first made choice of, lest the one might contradict the other, and thereby be guilty of perjury: and in a parallel case, betwixt Mackenzie of Rosend, and Swinton of Strathore, the Court of Session refused to grant warrant for summoning new witnesses.

22 June, and  
2 July,  
1718.

The appellant contended, also that some of the witnesses, whom he had discovered to be necessary for his purpose were not in Scotland at the time of the examination, and so could not be brought in evidence; and secondly, that the appellant could not be barred from further proof until circumduction of the term. But, when the appellant put into Court a list of the twelve new witnesses, it was asserted for the respondent, that seven of them were either dead, or none such to be found out; and that the

other five were the appellant's own tenants, whom he could not be ignorant of, and might have summoned with the first thirty-five witnesses. To this no answer was made. And though there was no circumduction of the term made when the appellant petitioned the Court in July 1718, yet such circumduction was made in December thereafter, before the petition of appeal was lodged; and that interlocutor is not appealed from.

The appellant in the Court below supported his allegations by the decisions of the Court, *Sir John Houston against Cochran of Kilmaronock*, and *Smith against the Fewars of Brichen*, in both which cases the Court allowed the pursuers a warrant for summoning new witnesses. But these precedents differ very much from this case: that of *Sir John Houston against Cochran* was in order to discover a fraud; and there it appeared that some witnesses pointed out new discoveries that might be made by others, which in such a matter it was most just for the Court to enquire into. But here the facts were all plain, done in the open fields, within a furlong of the appellant's house, and he and his tenants were daily witnesses of the respondent's possessing the ground in controversy, and so could not be ignorant of the proper witnesses he was to make use of. Neither is the case, *Smith against the Fewars of Brichen*, the same with this; for that action was at the instance of a minister for proving what the defenders were in the use to pay yearly to his predecessors; ministers are presumed to be ignorant of what their predecessors possessed, and by their ignorance their successors in office might be deprived of a living. Before any such warrant be granted, even in the most favourable case, the Court must be satisfied that it is *res noviter veniens ad notitiam*. The respondent is sufficiently supported by the act of Parliament 1672. c. 16. Art. 25. whereby it is statuted, that "there shall only be two diligences against witnesses" &c.; so that if they appear not to give evidence upon the first summons there is a second warrant for taking them into custody until they give caution to appear: and he is supported, also by the acts of sederunt, by which it is clear the appellant is excluded from all pretence of summoning new witnesses.

Judgment,  
8 February  
1719-20.

After hearing counsel, *It is ordered and adjudged, that the petition, and appeal be dismissed, and that the interlocutors, sentences or decrees complained of in the said appeal be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondent the sum of 3*l*. for his costs in respect of the said appeal.*

For Appellant, *David Dalrymple. Rob. Raymond. Will. Hamilton.*

For Respondent, *Thomas Lutwyche. Sam. Mead.*



The Commissioners and Trustees of the  
forfeited Estates, - - -

*Appellants;*

Case 57.

Kenneth Mackenzie of Assint, a minor,  
by Colonel Alexander Mackenzie, his  
Curator. - - -

*Respondent.*

10 February 1719-20.

*Act of Parliament, 5 Geo. 1 c. 22. Papist attainted of Treason.*—The Act 5 Geo. 1 c. 22, having limited a certain time for presenting exceptions, against a forfeiture, a person who presented his exceptions as protestant heir of a trustee could not, after expiration of the time limited reply as protestant heir of those for whom the trust was created.

*Trust Estate held for a Papist.*—An estate held in trust for the Earl of Seaforth, a papist, was forfeited to the public by his attainder, and could not be taken up, by the protestant heir.

**A**BOUT the year 1650, George, then Earl of Seaforth, having contracted very large debts, many of his creditors obtained apprisings against his estates. Afterwards George Earl of Cromarty, and other friends of the family compounded with some of the creditors who had recovered the apprisings that were prior and preferable; and these apprisings were transferred to them in trust for the family. These apprisings not being redeemed within ten years, the absolute property of the estate became thereby vested in them, and many of the creditors were excluded. And the apprisings in the persons of the Earl of Cromarty and others were conveyed to one Kenneth Mackenzie, and by him again made over to Isabel Countess of Seaforth, as trustee for the family. This Isabel afterwards made a conveyance thereof to Kenneth Mackenzie of Grunziard, and died in 1715.

Isabel Countess of Seaforth, had three sons, Kenneth Earl of Seaforth, who died before her in 1701, father of William late Earl of Seaforth, John, father of the respondent Kenneth, and Colonel Alexander Mackenzie, Kenneth's curator. William Earl of Seaforth was a professed papist; the respondent was next protestant heir of the family.

By act of Parliament 1 G. 1. c. 42. the said William, Earl of Seaforth, was among others attainted of high treason, from the 24th of June 1715; and by an act 1 G. 1. c. 50. the estates whereof any person attainted was seised or possessed on the 24th of June 1715, were vested in his majesty for the use of the publick; and these estates were afterwards vested in the appellants, to be sold for the use of the publick by the act, 4 G. 1. c. 8.

The appellants caused the estate of Seaforth to be surveyed as one of the estates forfeited, and vested in them; but in this they were opposed by the respondent. After the attainder of Earl William, the respondent, Kenneth Mackenzie of Assint, was, by his curator Colonel Alexander Mackenzie, served nearest protestant heir to the said Isabel Countess of Seaforth, on the ground of

the attainted Earl's being a papist ; and claimed the estate of Seaforth as belonging to him in property upon that right, exclusive of the right of the said William late Earl of Seaforth attainted.

5 G. 4. c. 22

It being enacted by the act 5 G. 1. c. 22. that it should be lawful to every person pretending right to any estate surveyed by the said trustees in Scotland, for the use of the publick to present their exceptions on or before the 1st of August 1719, to the Court of Session in Scotland, two several exceptions were presented to that Court against the survey of the estate of Seaforth. The first of these was in the name of the respondent and his curator, setting forth that the estate belonged to him in property as protestant heir to Isabel Countess of Seaforth ; and that William the attainted earl had no manner of title to it. In support of this exception he founded upon the act of Parliament 1700, c. 3., intitled by the Act for preventing the growth of popery ; by which it is inter alia enacted, " that no person or persons, professing the popish religion, past the age of 15 years shall hereafter be capable to succeed as heirs to any person whatsoever," &c. And if any person or persons educated in the popish religion shall happen to succeed as heirs to their predecessors before the said age of 15 years, they shall be obliged to purge themselves of popery by taking the formula by the act directed before they attain to the said age. And, " if the succession devolve to any papist after the age of 15 years ; or any conveyance shall happen to be made in their favours to any person, whom they might have succeeded, or the right be devolved to them by succession or other conveyance before that age, and they neglect or omit to renounce popery as aforesaid ; then and immediately thereafter, their right and interest in, or by the aforesaid succession or conveyance shall become void and null, and shall devolve and belong to the next protestant heir or heirs, who would succeed, if they and all the intervening popish heirs were naturally dead," &c.

1700. c. 3.

The other exception was in the name of Kenneth Mackenzie of Grunziard, the dispoinee of Countess Isabel ; the appellants made answer to this last exception, that the disposition to this Kenneth Mackenzie could be of no avail ; because Countess Isabel's own titles were trust rights for the behoof of the family of Seaforth and of the late attainted Earl, as heir of the family, and that therefore she could make no conveyance in prejudice of the family, or in breach of trust ; and that the appellants could now, as come in the right of the attainted Earl compel the heirs of Countess Isabel, or her dispoinee to divest themselves of the estate, and of their titles which were intrust only. On the 15th of August 1719, the Court found " that the right to the nine appraisings in the person of the said Countess Isabel was a trust for behoof of the heir of the family of Seaforth ; and that she could not dispoine in favour of a third party in prejudice of the said trust ; and therefore dismissed the exception of the said Kenneth Mackenzie of Grunziard." So far the judgment of the Court was acquiesced in.

In the course of the debate upon the other exception presented by the respondents, it was contended by the appellants that it now fell to be dismissed being founded upon the service as protestant heir to Countess Isabel and that all further exception was barred after the first day of the then current month. The Court on the said 15th day of August 1719, "found the right of the nine apprisings in the person of Isabel Countess of Seaforth" "was a trust for the behoof of the heir of the family of Seaforth, (a) and found that the exceptant's service as protestant heir to the said Isabel Countess of Seaforth, was a sufficient title to found his exception on, he being apparent protestant heir to the family of Seaforth; and found that the exceptant might reply on his right of apparenacy as protestant heir of the family of Seaforth, though it were not expressly set forth in his exception."

And after subsequent proceedings, the Court, on the 18th of the same month of August 1715, "found it relevant and proven, that William late Earl of Seaforth, was not seized or possessed of, or interested in, or entitled unto the estate of Seaforth in his own right, or to his own use or any other person in trust for him on the 24th June 1715 years, or at any time since; and that the publick, by his attainder, has no right nor interest in the said estate of Seaforth; and therefore sustained the exception presented by the said Kenneth Mackenzie of Allint as protestant heir, and found, decerned, and declared accordingly."

The appeal was brought from "part of an interlocutory sentence or decree of the Lords of Session of the 15th of August 1719, and from the whole interlocutory sentence of the said Lords the 18th of the same month." Entered 19.  
Dec. 1719.

#### *Heads of the Appellant's Argument.*

The exception presented for the pretended protestant heir ought to have been dismissed, because it was founded only upon that pretended title of protestant heir to Countess Isabel the trustee, not of protestant heir to any of the Earls of Seaforth, for whose benefit the Countess had undertaken the trust. As heir to Countess Isabel he could carry no more than the trust estate, which was only a name or the office of trustee, but he could not carry the right of property, which remained in the heir of the family, and so was forfeited by the treason of the late Earl William who was the heir of the family.

The service of the respondent as nearest protestant heir to Countess Isabel was void, as not being warranted by the said act 1700, in regard that, by that act a service as protestant heir to the true proprietor is only allowed; but not a service as protestant heir to a person vested in an estate merely in trust for the behoof of another.

(a) So far the interlocutor not appealed from.

Though

Though by the act 1700, a professed papist is declared incapable of succeeding to an estate, yet that is not an absolute incapacity taking place in all events, but is a benefit introduced only in favour of the protestant heir, upon the condition that he claim it by serving heir; and if such protestant heir do not make use of the privilege, the full right to the estate remains in the person of the popish heir, who enjoys the profits, can charge it with debt, or alienate it at pleasure. The respondent, the pretended protestant heir, never having claimed before the attainder, the right to the estate was on the 24th of June 1715, in the person of William late Earl of Seaforth, attainted, at least of Countess Isabel, her heir or assignee, in trust for the said late Earl, and so remained forfeited by his treason. And the respondents claiming the estate after the attainder was a direct fraud contrived to exclude the right of the publick; since if the late Earl of Seaforth had not been attainted he might have barred the pretensions of the protestant heir by swearing the formula contained in the act 1700; but he being now attainted, cannot have an opportunity of swearing that oath, and so it must remain uncertain whether he would have sworn it or not; and of consequence whether or not he was incapacitated by the act 1700.

Admitting, but not granting that the respondents pretended title of protestant heir to the Earls of Seaforth were good, yet it is plain that these two titles of heir to Countess Isabel, and heir to the Earls of Seaforth, were entirely separate rights to separate estates, the one a trust estate, the other a right of property. The exceptant therefore was bound either to have laid his exception upon both titles as consistent; or otherwise he could claim no more upon that title of heir to Countess Isabel, but what she herself was vested with, and possessed of, which was nothing more than a nominal right of trust; so the other right, which is the true right of property, must remain with the publick, since no exception was presented on, or before the first day of August 1719, upon any title that could carry that property.

The pretended notoriety of the late Earl of Seaforth's being a papist is good for nothing in this case, since notwithstanding of such notoriety, it was in his power fully to have secured his own right, and to have excluded this protestant heir by swearing the oath recited in the act 1700; and therefore, it was not only necessary to adduce some other proof of his being a papist than a pretended notoriety: but even such a proof cannot be sufficient now that the late Earl is excluded from an opportunity of swearing the said oath by his attainder, in as strong a manner as if he were naturally dead.

If the exceptant's reasoning be good, the act of parliament 1700, in place of being an *Act for preventing the Growth of Popery*, would prove the greatest encouragement to papists, and the increase of popery; for papists in a good correspondence with their nearest protestant kinsmen, might thereby enjoy their estates to the full extent, commit treason at pleasure, without a possibility of forfeiting such estates by their treasons, but would always have a security

nity for them by the intervention of the pretended protestant kinsmen, and their claiming the estate though after an attainer.

*Heads of the Respondent's Argument.*

The act 1700 expressly declares, that if the popish heir do not renounce popery before his age of 15 years, his right and interest shall become void and null, and shall devolve and belong to the next protestant heir; to whom likewise the rents and profits of the estate from and after the popish heir's incurring the irritancy are declared to belong. So the very same clause which makes the popish heir's right void and null, at his age of 15 years, grants the rents and profits of the estate from that period to the protestant heir; and though the act declares that the protestant heir's right shall be burdened with the debts of the popish heir, yet that proviso is to be understood only of such debts of the popish heir as were contracted before his exclusion from the succession that is before the 15th year of his age. Any other construction must render the act of no use, for if the popish heir had a power to charge the estate with debts, after that period, the design of the act might be utterly avoided by the papist's contracting debts to the value of the estate.

The appellants contended that there was no evidence offered that the attainted person was a papist; but besides the notoriety of the fact, the verdict of the jury, who served the respondent protestant heir to his grandmother Countess Isabel, is a legal proof that the late Earl was a papist otherwise such verdict could not have been returned.

They also contended, that the respondent could not be served protestant heir because the late Earl had two children alive: but the act provides that infants, the issue of popish parents, shall be deemed popish; therefore the service is still good, for the children are infants, and under the education of popish parents, begotten and born after the rebellion, and their blood attainted.

With regard to the late Earl's power of taking the formula prescribed by the act within 10 years, this could not be forfeited, it being a personal act, which nobody but he could perform.

Countess Isabel was seised in this estate, her right was upon record, nor did there appear any trust in the deeds under which she claimed; since then, she was the only apparent owner of the estate, the respondent must have served heir to her in order to establish his right. The trust was only declared by the judges, after the exceptions were presented; and though she was but a trustee, and though the respondent stood only in her right, yet that trust could not be for the benefit of the late Earl of Seaforth; for, by the act 1700, he could not possibly have any right whatsoever in his person, and consequently the appellants could have none. The trust was only for the benefit of the heir of the family capable to take, which is the respondent; and as the late earl could not have compelled Countess Isabel to divest herself of the trust in his favour, so neither could the appellants; and as the trust was not declared till after the exceptions were presented, and consequently could not be taken notice of therein, so that will not bar

bar him still from insisting that though this was a trust, yet it was a trust for himself, and he was the only person who could claim the benefit of it.

With regard to the alleged collusion, all services are connected with the death of the party served to, and drawn back accordingly; and the intervening attainder cannot alter the case, seeing before Earl William was attainted he was by the act 1700, disabled from having any right whatsoever in his person; and all appearances of collusion are excluded by the following facts: That the respondent's father had long since taken out briefs to serve himself nearest protestant heir to Earl Kenneth, which were advocated to a higher judicatory by the late Earl William and afterwards dropt by reason of the death of the respondent's father, which happened soon after: that the respondent was a minor: that his curator was out of the country in the service of government: that the minor's briefs were taken out shortly after the Countess's death: and that the service could not be sooner completed, because, before the attainder, the Shire of Ross, where the Estate lies was inaccessible, being at that time the seat of the rebellion.

Judgment,  
30 Feb.  
1719-20.

After hearing counsel, the question was put whether the said decrees shall be reversed; it was resolved in the affirmative. Ordered and adjudged, that so much of the decree or interlocutory sentence of the Lords of Session, of the 15th of August 1719, whereby they found "the respondent the exceptant's service as protestant heir to Isabel late Countess of Seaforth a sufficient title to found his exception on, and that the exceptant might rely on his right of appearing as Protestant heir of the family of Seaforth, though it were not expressly set forth in his exception;" and also the whole interlocutory sentence of the said Lords of Session of the 18th of August, whereby they "found it relevant and proven that William late Earl of Seaforth was not seised, or possessed of, or interested in, or entitled unto the estate of Seaforth in his own right, or to his own use, or any other person in trust for him, on the 24th of June 1715, or at any time since, and that the public by his attainder had no right or interest in the said estate of Seaforth," be reversed: and it is further ordered that the respondents be removed from all possession of the estate in question which they have obtained, and from the receipt of the rents and profits thereof; and that the said commissioners and trustees for the forfeited estates take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto, any right, title, or claim of the respondents, or either of them, notwithstanding.

For Appellants, Ro. Dundas; Tho. Reeve.

For Respondents, Robert Raymond. Dun. Forbes. Will. Hamilton.

William Morison, of Preston Grange, Esq ; *Appellant* ; Case 58.  
 Sir William Scott of Thirlestayn, William  
 Nisbet of Dirleton, and John Scott of Har-  
 den, a Minor, by his Guardian, - *Respondents*.

19th Feb. 1719-20.

Fountain-  
 hall,  
 25 Feb.  
 1697.  
 19 Nov.  
 1702.  
 30 June  
 1704.

*Husband and Wife*.—A bond, with a clause of annual-rent, is granted blank in the creditor's name, but delivered to a wife, during the subsistence of her marriage : the husband entails his real estate on the grantor of the bond, and also conveys to him all his personal estate, but was not privy to said bond : in a competition between the executor of the husband, and the executor of the wife, the husband's executor is preferred to said bond : and the wife's executor is ordered to refund what had been paid to her, in her widowhood.  
*General Disposition*.—A general disposition of a man's personal estate, made in favour of one who had, without the husband's knowledge, granted a bond to the wife, did not release this bond.

SIR John Nisbet of Dirleton, deceased, having issue only one daughter, disposed of her in marriage to Sir William Scott of Harden. Of this marriage there was no issue ; and Sir John Nisbet settled his whole real estate, worth about 3000*l*. per ann. and also conveyed all his personal estate, *acquisita et acquirenda*, to the respondent William Nisbet, passing by his daughter.

Soon after, in March 1688, the respondent, William Nisbet, executed a bond for 40,000 merks, Scots blank in the name of the obligee, with a clause of annual-rent, and delivered it to Lady Nisbet, the second wife of the said Sir John Nisbet, during his lifetime, or to one Bennet, of Grubbet, on her behalf. This Lady Nisbet was not the mother of Lady Scott, Sir John's daughter.

Sir John Nisbet dying soon after intestate, an agreement was entered into between the respondent William Nisbet and the said Sir John's widow, whereby she delivered up to him the said bond for 40,000 merks, to be cancelled ; and he executed a new bond to her for 30,000 merks in lieu thereof. Mutual releases were then given, and she at the same time executed a deed, whereby she obliged herself, that in case Lady Scott, Sir John's daughter, should be found to have any right to the said bond of 40,000 merks, that she should then deliver up to the respondent William Nisbet the said second bond for 30,000 merks.

Upon this new bond the respondent William Nisbet made one payment to the widow of 6000 merks in 1691, and another of 3141*l*. 10*s*. Scots in 1693 : and, for the widow's further security and payment of the said bond, he obliged himself to communicate and convey to her two dispositions, by which Sir John Nisbet had made over to him the respondent all the estate that he then had, or should acquire during his life.

Lady Scott of Harden was afterwards confirmed executrix to her father Sir John Nisbet ; and, with consent of her husband, brought an action before the Court of Session against the respondent

dent William Nisbet, and the widow of Sir John, for payment to them of the said 40,000 merks. Soon after the commencement of this action the widow died, and the appellant, her brother and executor, was made party to the same.

In this action the respondent William Nisbet, in January 1697, was examined upon oath as to the circumstances of the transaction; and deponed, that the said bond for 40,000 merks was granted to the said Sir John's lady during her marriage, and that after the said Sir John's decease, his widow delivered him up the said bond of 40,000 merks, which he cancelled, and in lieu thereof executed a new bond to her for 30,000 merks, of which he had paid some part. The Court, by interlocutors on the 6th and 11th of February 1697, decreed against the respondent William Nisbet for the said 30,000 merks in favour of Lady Scott and her husband, and found that William Nisbet might have a deduction of what sums he had paid on the said bond, reserving a power to Lady Scott and her husband to claim the sum so to be deducted, from the appellant, as executor of his sister Lady Nisbet, to whom these payments had been made; and also decreed for the other 10,000 merks, which made the complement of the first bond.

The appellant afterwards insisted that the bond for 40,000 merks was assigned by Sir John Nisbet, the husband, to the respondent William Nisbet, by a general assignment made to him of all his personal estate, goods, and effects, *acquisita et acquirenda*; but the Court, on the 10th of February 1697, "found that the bond was not transferred by the disposition granted by the said Sir John Nisbet to the respondent William Nisbet, but that the same did belong to the Lady Scott as executrix to Sir John Nisbet." And upon the 25th of same month, the Court "preferred the Lady Scott and her husband to the appellant as to the sums in the said bond owing by the respondent William Nisbet." The decree of the Court was sued to execution against the respondent William Nisbet, and he was thereby compelled to pay to Lady Scott and her husband the sum of 21,267 merks, which with the sums formerly paid by him to the widow was in full of the bond for 30,000 merks and interest; and Lady Scott with consent of her husband granted a discharge to the respondent William Nisbet for the money so paid to them, with absolute warrandice from them their heirs and executors jointly and severally.

Lady Scott and her then husband, further, brought their action against the appellant for the sums received by his sister the widow; and the Court, by two interlocutors of the 19th of November 1702, and 10th of July 1707, "Ordnained the appellant to refund the said two payments of 6000 merks and 3141*l.* 10*s.* Scots."

Sir William Scott of Harden dying, his widow was afterwards married to Sir William Scott of Thirlestayne, her second husband.



The appeal was brought from "several decretal orders of the Lords of Session of the 19th and 25th of February 1697, the 19th of November 1702, and 10th of July 1707."

Entered,  
14 April  
1714.

The appeal was presented on the 14th of April 1714, and the two interlocutors of February 1697 were then only appealed from; the two others were afterwards added. Great alterations took place afterwards in the situation of the parties, before the appeal was finally discussed. Lady Scott, the daughter of Sir John Nisbet, died, and the estate of Harden having come to the heir of entail, of the Highchester branch, was possessed by two minors successively: much delay was occasioned by making these different persons and their guardians or curators parties to the appeal; though the different steps taken are not of importance enough to be more minutely taken notice of.

At the time of hearing the appeal, Lady Scott, the daughter of Sir John Nisbet, was dead, Sir William Scott of Thirlestayne, her surviving husband, being her personal representative; John Scott of Harden, the minor, was the heir of entail, and personal representative of Sir William Scott of Harden, the first husband of Lady Scott, Sir John Nisbet's daughter.

#### *Heads of the Appellant's Argument.*

The bond for 40,000 merks was designed by the giver, for the lady herself, exclusive of the husband's right: and the bond was calculated for that purpose, viz. by leaving the obligee's name blank, as was then allowed by the law of Scotland, as blank indorsements on bills now are in England; by a clause of annual-rent, which regularly excludes the *jus mariti* as to the principal sum; and by depositing the bond in a trustee's hand, not to be delivered to the lady till after her husband's death, for non-delivery of evidents suspends conveyance of property at any time. It was therefore straining both against the design of the parties, and the law, to make the said bond for 40,000 merks any part of Sir John Nisbet's estate.

If it had been in *bonis defuncti*, (as it was not,) yet the deceased having by two deeds disposed to his heir of entail, all that he had or should acquire during his life; and that disposition having been made over to the appellant's sister in security, it is evident, that Lady Scott and her husband could have no pretence of title to it, by virtue of their confirmation. And further, in both dispositions Lady Scott is expressly excluded, as being already provided for.

It was objected, That the said bond for 40,000 merks could not be said to be contained in either of the dispositions in favour of the heir of entail, because Sir John Nisbet could not be supposed to know of it. But in all deeds of a testamentary nature, as these are, a general clause is thrown in of purpose to comprehend what may not fall specially under consideration for the time, and it were of too dangerous consequence to explain such clauses, with relation to what might or might not be in contemplation at the making of them. Indeed, it is certain, Sir John could not think

think of the bond in question, when he made those dispositions; for it was not in being till near a year after the last of them.

It was objected further, that the last general disposition obliges the heir of entail to employ the sums for particular uses; and, therefore, that he could not apply it for other purposes, by his agreement with Lady Nisbet. That, indeed, may concern the heirs of entail, but no ways the Lady Scott, and her husband, from whom the estate real and personal is expressly conveyed; and even the heir of entail cannot hinder William Nisbet, from giving bond to whom he pleases.

The respondents have contended that whether these decrees be reversed or not, the appellant can never recover his money, because of some private transactions between Sir William Scott of Harden and his lady; by which, notwithstanding Sir William had right to the sums in question, yet Sir William had agreed that these sums should belong to his lady; and that the appellant, had released all demands upon her. But, as to the private transactions between Sir William Scott of Harden, and his lady, the appellant humbly conceives these can never affect him: and as for the release to the lady, it is only for a part of the sums claimed, and in it the appellant's actions and claims, and even this appeal are expressly reserved against all the other respondents for the remainder thereof; and if the respondents have this or any other matters of discharge of the sums claimed by the appellant, the proper time to object them will be when the appellant brings his action in Scotland, for the payment of his money, which he cannot do till these decrees be set aside.

*Heads of the Argument of the Respondent William Nisbet.*

This respondent having paid the money by the decree of the Lords of Session to the said Lady Scott and her husband, where the right of both the parties contending for it was in issue he ought at all hands to be safe, nor should the appellant have any remedy against him especially since Lady Scott and her husband, upon the respondent's payment of the money, gave him a discharge thereof with absolute warrandice; and the appellant has, pending this appeal, released the said Lady Scott, who by her discharge was obliged to indemnify the respondent. Besides, Sir John Nisbet's widow under whom the appellant claims, obliged herself to indemnify this respondent in case decree should be given in favour of Lady Scott; so that the appellant as representing his said sister, can have no claim against the respondent, since that indemnity granted by her must be binding upon the appellant.

*Heads of the Argument of the Respondent John Scott.*

Sir John Nisbet deceased, could never be supposed to have assigned the bond for 40,000 merks, since he knew nothing of it, and it was kept secret from him. The first deed of assignment of his personal estate expressly relates to an inventory, to be left by him, of the bonds due to him; and though an inventory was actually made, yet that bond not being mentioned, the assignment could not possibly convey

it to the respondent William Nisbet. It is true, the second deed of assignment is in general terms, and has no relation to an inventory; but that does not alter the case; because, as that was only a continuation of the former conveyance, it must receive the same interpretation by reason of the assignor's ignorance, so it was granted with an intention and design to have the sums conveyed, applied for purchasing land to be entailed after the same manner with his other estate. If this bond, therefore, was assigned, then it ought to be laid out, according to the directions in that deed; which plainly shews that Sir John Nisbet had no such thing in view by the assignment. This will effectually exclude the widow, or the appellant, who claims under her; for if the bond was assigned to the obligor, it was thereby extinguished, and the appellant can claim nothing by it.

The money paid by the respondent William Nisbet, to the deceased, Sir William Scott and his lady, was applied entirely to the separate use of the lady, and securities taken for the same in her own name; and she, after Sir William's death, received payment thereof. If, then, the appellant had any action, it must be against the said lady or her estate: but pending this appeal, the appellant has released the said lady, and her husband the respondent Sir William Scott of Thirlestayn of this appeal, and the grounds thereof, and of all demands against them or either of them in their own right, or as possessing any part of the estate heritable or moveable, belonging to the deceased Sir William Scott of Harden.

On the part of the respondent Sir William Scott there was set out the release or discharge granted by the appellant, reciting the interlocutors from which he had appealed; and that the respondent and his said wife had paid him the sum of 15,000 merks; therefore the appellant exonerated, quit-claimed, and simpliciter discharged this respondent and his said wife, their heirs, executors, and successors whatsoever, for themselves, or as intromitting with any part of the estate heritable or moveable that belonged to Sir William Scott of Harden, by whatever right or title, of all actions, pursuit, instance, and execution whatever, competent, or that might be competent to the appellant, his heirs, executors, and successors, of and concerning this appeal, and grounds whereupon the same proceeded and was founded; and of the said appeal itself, and grounds thereof, whole heads and articles of the same, with all that had followed or might follow thereupon; and of all other claims and demands whatsoever that the appellant or his forefairs had or might have, any manner of way, against this respondent and his said wife and their forefairs, reserving a power to proceed against the heirs of Sir William Scott of Harden, and the respondent William Nisbet. And the appellant bound and obliged him, his heirs, executors, and successors whatsoever, to warrant, acquit, and defend his said discharge to be good, valid, and sufficient to this respondent and his said wife and their forefairs,

said, for their exoneration of the premises at all hands, and against all deadly as law will.

Judgment,  
19 Feb.  
1719-20.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several decretal orders complained of in the said appeal be affirmed.*

For Appellant, *Tho. Lutwyche, Dan. Forbes.*  
For Respondent Wm. Nisbet, *Ro. Dundas.*  
For Respondent John Scott, *Rob. Raymond.*  
For Respondent Sir Wm. Scott, *Will. Hamilton.*

Cafe 59. The Commissioners and Trustees of the forfeited Estates, - - - - - *Appellants;*  
James Duke of Hamilton and Brandon, a  
Minor, by his Curators and Commissioners, - - - - - *Respondent.*

26th Feb. 1719-20.

*Forfeiture under the Act 1 Geo. 1. c. 20.—Thirlage.*—An act of parliament gives to subject superiors the forfeited estates of their vassals: the Earl of Linlithgow being attainted, forfeited to the Duke of Hamilton a mill held of his Grace as superior; but the earl having thirled part of his estate, held of the Crown, to this mill, this thirlage was not forfeited to the Duke of Hamilton.

BY an act of parliament 1 G. 1. c. 20. it is, inter alia, enacted, "That if any subject of Great Britain, holding lands or tenements of a subject superior in Scotland, has been or shall be guilty of such high treason, or treasons" (as are mentioned in the act) "every such offender, who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures of high treason; and his lands or tenements held of any subject superior in Scotland shall recognise and return into the hands of the superior, and the property shall be, and is hereby consolidated with the superiority, in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of his superiors, *ad perpetuam remanentiam.*" The act likewise contains this farther clause, "And for preventing of frauds or collusion in order to evade this act, be it further enacted, that if the superiors, vassals, or tenants, to whom the lands, mines, mills, woods, fishings, and tenements above-mentioned are declared and ordained to belong, shall not, within six months, to be reckoned from the time of the attainder of the offenders, respectively obtain themselves in seise, or do diligence, really and without collusion, for attaining possession, in every such case the forfeiture shall belong to his majesty, his heirs and successors."

By

By another act of parliament, 1 G. 1. c. 32. intituled, "An act to attain John Earl of Mar" and others, it was enacted, "that from and after the 19th of January 1717, James Earl of Linlithgow should stand and be convicted of high treason, and should suffer pains of death, and incur all forfeitures, as a traitor convicted and attainted of high treason."

At the time of the forfeiture the Earl of Linlithgow was seised in certain lands and mills in the shire of Stirling, which he held from Anne Duchess of Hamilton, the respondent's grandmother, as superior. After the attainder, the Duchess of Hamilton, in pursuance of the act first mentioned, brought her action before the Court of Session, within the six months limited by the act, to attain the possession of the lands: but she dying, pending the said action, the same was revived by the respondent, her grandson and heir. On the 27th of June 1717, he obtained a judgment, declaring his right to the said lands, and decreeing to him the possession thereof; which he accordingly did obtain.

Upon the premises there was a mill, called the Mill of Leuchart, to which the late Earl of Linlithgow, after he had acquired it from the Duchess of Hamilton, thirled and astricted the tenants of a great part of his estate, though not held of the Duchess of Hamilton as superior. The appellants seized and surveyed the estate of the Earl of Linlithgow, and among other particulars thereof, the thirlage to the said mill of the lands not held of the respondent as superior.

The respondent, in terms of the act 5 G. 1. c. 22. intituled, "An act for enlarging the time to determine claims on the forfeited estates," presented his exceptions to the Court of Session against the seizure and survey made by the appellants. After answers for the appellants, the Court, on the 12th of August 1719, "Found that in virtue of the acts of parliament referred to in the exceptions, the respondent had right to the property of half of the lands of Mumrells, and of the north half of the lands of Leuchart and Brimage, with the half of the mills thereof; and also of the south half of the said lands of Leuchart and Brimage, and the half of the mills thereof, with the pertinents which are contained and described in the infeftments of the late Earl of Linlithgow, and were by him holden of the respondent, and to the rents, profits, and issues of the said lands, mills, and others, in the state and condition they were and stood in on the 24th of June 1715, and in and to the said rents, profits, and issues payable for the said lands, mills, and others, from and since that time, with the burden always of a proportion of the debts in terms of the late act of parliament 5 G. c. 22.: and decerned and declared the right and property of the said lands and others mentioned in the exceptions and writs produced, with the whole rents, issues, and profits thereof since the said 24th of June 1715, and in all time coming, to pertain and belong to the said respondent."

The appeal was brought from "An interlocutory sentence or decree of the Lords of Session of the 12th of August 1719."

Entered  
22 Jan.  
1719-20.

*Heads of the Appellants' Argument.*

By the act of parliament 1 G. 1. c. 20. the tenement holden by the vassal attainted for treason from the subject superior, continuing loyal and dutiful, is to recognise and return to the superior; which necessarily supposes, that what returns did once belong to the superior, and was given by the superior to the vassal. But the toll payable to the mill by the tenants of the estate of Linlithgow, and their obligation to grind at the same, did not flow from the respondent, but arose by particular agreement betwixt the late Earl of Linlithgow and his own tenants; and therefore the right of exacting that toll cannot in consequence of the said act belong to the respondent.

No right of vassalage or right of superiority can be constituted otherwise than by mutual consent both of superior and vassal; but so it is, that neither the late Earl of Linlithgow nor any ancestor of his, ever did enter into such a passion or agreement with the respondent or his ancestors, as that the estate of Linlithgow should be bound to grind or pay toll at the mill of Leuchart; and that such obligation, and the benefit arising from it, should become a part of the tenement holden by the Earls of Linlithgow of the respondent.

A vassal cannot, without consent of his superior, bring such a burden or servitude upon his tenement holden of such superior, whereby the superior may be hurt if the tenements should return to him by any of the ways that by law they may: and, therefore, the Crown never having consented to the late Earl of Linlithgow's binding his estate to grind at the said mill of Leuchart; when the estate returned to the Crown by forfeiture, such a burden or servitude cannot lawfully be claimed by the respondent to the prejudice of the Crown.

It was contended, that if the late Earl of Linlithgow had resigned the mill into the respondent's hands *ad perpetuam remanentiam*, the tenants of the estate of Linlithgow would have continued thirled to the mill. But the appellants positively deny this to be law.

It was contended further, that the superior is to have the tenement in the same condition that it was at the time of committing the treason. If the subject of the tenement holden of the respondent were improved; as, for instance, by rendering the lands more fertile, no doubt the benefit might accrue to the respondent: but that is not the case; it cannot be admitted, that the toll payable by the tenants of the estate of Linlithgow ever became a part of the tenement holden of the respondent. The late Earl of Linlithgow, might very well bind his own tenants for his own conveniency to grind at his mill for a time, without making that obligation of theirs a part of the tenement holden of the respondent, and might have released that obligation to his tenants at pleasure without consent of the respondent. These are evident proofs that the respondent, as superior, had no interest in that obligation. And therefore the mill of Leuchart ought to  
return

return to the respondent as it came from his ancestors, without such a burden upon the estate of Linlithgow.

*Heads of the Respondent's Argument.*

The distinction raised by the appellants, between the value of the lands at the time of the forfeiture, and the time of the grant, seems altogether imaginary, and without foundation. The statute, which is the ground of the respondent's claim, makes no such distinction; on the contrary, it points out the very reverse. The words of the act are, "that the lands and tenements held of any subject superior shall recognise and return into the hands of the superior." Thus the reward given by the act to the superior, is the lands and tenements held of him; and it is the tenure, not the value, which is the rule of what he is to have. And the appellants admit that these lands claimed do all hold of the respondent. But should there have been any question, the subsequent words have removed it: these are, "And the property shall be and is hereby consolidated with the superiority in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of the superior *ad perpetuam remanentiam*." Now there can be no question, but if the late Earl of Linlithgow, in place of forfeiting the premises in question, had resigned them into the hands of the respondent as his superior, that would have carried the lands of the value they were at the time of the resignation, and not at the time of the grant by the superior to the vassal. For, as to this question, there can be no difference betwixt a resignation to a superior and a grant to a stranger, which would have carried the present value; nor can the improvement of the rent by this thirlage make this case different from any other improvement whatever. And this the Court in the present case unanimously determined.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentence or decree complained of in the said appeal be thus far varied, that as to such lands, wherein the estate or interest of the late Earl of Linlithgow was forfeited to the Crown, the tenants thereof shall not be bound to thirle to, or grind at the mill of the respondent, in the pleadings mentioned; and that in all other particulars, the said decree be affirmed.*

Judgment,  
26 Feb.  
1719-20.

For Appellants, Ro. Dundas. John Willes.

For Respondent, Rob. Raymond. Dun. Forbts. Will. Hamilton.

Case 60. The Commissioners and Trustees of the Forfeited Estates, - - - Appellants;  
 1 Peers Williams, 612. Alexander Gordon of Auchintoule, - Respondent.  
 Foster's Crown Law, p. 81.

25th Feb. 1719-20.

*Falsa demonstratio.—Misnomer.—Forfeiture under 1 Geo. 1. c. 42.*—Major General Thomas Gordon is attainted by act of parliament; and the commissioners seize the estate of Alexander Gordon, whose description agreed with the attainted person's in every thing but the christian name: but upon exceptions taken the seizure is annulled.

ALEXANDER GORDON, the respondent, was, on the 25th of February 1681, infest and seised in fee in the lands of Auchintoule and others in the shire of Banff, in Scotland; and one Peter Gordon was, on the 11th of November 1713, infest and seised in the lands of Leathers and others in the shires of Banff and Aberdeen, and, on the 12th of November 1713, in the lands of Thomas-town and Smallburn, in trust for the respondent.

By an act of parliament, 1 G. 1. c. 42., intitled "An act for the attainder of George Earl of Marischall," &c. it was enacted, that if, amongst others, Major General Thomas Gordon, Laird of Auchintoule, should not render himself to one of his majesty's justices of the peace, on or before the last day of June 1716, he should stand attainted of high treason from the 12th of November 1715. By virtue of two other acts of parliament, 1 G. 1. c. 50. and 4 G. 1. c. 8., vesting the forfeited estates in the appellants, they seized and surveyed the said lands of Auchintoule and others, before mentioned, as vested in them by the attainder of Major General Thomas Gordon, Laird of Auchintoule.

Against this seizure and survey, Katherine Gordon, the respondent's wife, by virtue of a factory from her husband, bearing date in July 1715, in terms of the act 5 G. 1. c. 22., presented exceptions to the Court of Session, setting forth the respondent's title to the lands before mentioned; and contending, that he was not attainted by the said act of parliament 1 G. 1. c. 42., there being no such name to be found in that act as Major General Alexander Gordon, but only Major General Thomas Gordon: and she therefore prayed, that the premises might be found to belong to him, exclusive of the appellants.

The appellants made answers; and the Court, upon the 20th of August 1719, "Found that the exceptant Major General Alexander Gordon, of Auchintoule, was seised and possessed of the lands of Auchintoule and others mentioned in his exception, in his own right; and that he the said Major General Alexander Gordon did not stand attainted by the said act attainting George Earl of Marischall, &c. and that Major General Thomas Gordon, of Auchintoule, mentioned in the said act of attainder, was not seised or possessed of, or interested in,

"or



" or entitled unto the said estate of Major General Alexander Gordon in his own right, or to his own use, or any other person in trust for him, on the 24th day of June 1715, or at any time since; and that the public, by the attainder of Major General Thomas Gordon, had no right or interest in the said estate of Major General Alexander Gordon of Auchintoule; and therefore sustained the exception for the said Major General Alexander Gordon of Auchintoule."

The appeal was brought from " a decree of the Lords of Session of the 20th of August 1719."

Entered,  
1 Feb.  
1719-20.

*Heads of the Appellants' Argument.*

Major General Gordon, Laird of Auchintoule, was attainted by the aforesaid act, who is the respondent; and although there may be an error, as to the name of *Thomas* in place of *Alexander*, yet the other additions of *Major General* and *Laird of Auchintoule*, do sufficiently describe the respondent to be the person by that act attainted, and cannot be applied to any other person alive but to him; and the misnomer, in such a case, where the person is otherwise fully described, cannot make void an act of attainder in parliament.

*Heads of the Respondent's Argument.*

It is plain by the act of attainder in the present case, that Thomas Gordon, Laird of Auchintoule, and not Alexander, was attainted; and it does not concern the respondent to shew, that there was one Thomas Gordon, Laird of Auchintoule, who might be by that act attainted. Since Thomas Gordon is attainted, it seems impossible for any Court to transfer that attainder of Thomas to the respondent, whose name is Alexander. And since that act proceeds only to attain persons as a penalty for their not appearing at a day by the act limited, how could the respondent think himself concerned to appear in obedience to that act, where he did not find his name mentioned.

Whatsoever might be said in case the christian name had been omitted, and if Major General Gordon of Auchintoule had been attainted, cannot concern this case; because there the difficulty might be whether the person was sufficiently described without mentioning the christian name. The case is totally different, when the christian name is added, for then the designation is full, and denotes a person as different from the respondent as thereby described, as Thomas is from Alexander. The mistake here cannot be rectified by alleging *quod constat de persona*, because such such allegation is directly contrary to the act of attainder, and by the same reason Alexander might be executed upon a judgment against Thomas; and consequently one man might lose his life, estate, and honour by a prosecution carried on against a person to him unknown.

After hearing counsel, " it is ordered that the further consideration of this cause be adjourned till to-morrow, and that all the judges do then attend."

Journal,  
24 Feb.  
1719-20.

25 Feb.

The judges accordingly attending, they were directed to deliver their opinions in relation to the following matter as stated to them, viz.

"The act of parliament for the attainder of George Earl of Marischall, and others, having enacted, 'That unless Major General *Thomas Gordon*, Laird of Auchintoule, should render himself to one of his majesty's justices of peace by a day therein specified,' and no such render being made; and all the said additions belonging to the respondent, but that his christian name is Alexander, and not Thomas, 'whether if the respondent Major General Alexander Gordon, Laird of Auchintoul, had been brought into the King's Bench, and execution prayed against him, that Court would have awarded execution against him?'"

And having conferred together, the Lord Chief Justice of the Court of King's Bench delivered their opinion, "That the said Court could not award execution on the act against *Alexander*; because in awarding of execution, they must pursue the act of parliament, which is the judgment on which it is to be founded."

Judgment.

It is thereupon ordered and adjudged, that the said petition and appeal be dismissed, and that the decree therein complained of be affirmed.

For Appellants, *Ro. Dundas.**Tho. Bootle.*For Respondent, *Will. Peere Williams. Will. Hamilton.*

Case 61. The Commissioners and Trustees of the For-

Vide No. 57  
of this Col-  
lection.

feited Estates, - - - Appellants;

Kenneth Mackenzie of Assint, a Minor,  
by Colonel Alexander Mackenzie, his  
Curator, - - - Respondent.

1st March 1719-20.

*Act of Parliament 5 Geo. 1. c. 22. — Papist — Trust — Estates forfeited by which were acquired by the trustees for a Papist superior, but were forfeited again by the Papist's treason.*

THE respondent, the minor, had obtained the judgment of the Court of Session, decerning to him in his character of protestant heir, the estate of Seaforth, upon the attainder of the late Earl for high treason, but that judgment was reversed upon appeal (No. 57 of this Collection.) He had also made a claim before the Court of Session, founded upon a clause in the act 1 Geo. 1. c. 20. "for encouraging all superiors," &c. for the estates of six of the vassals of the late Earl of Seaforth, who were attainted of high treason, viz. John Earl of Mar, Sir John Mackenzie

kenzie of Cowll, John Mackenzie of Avoch, Alexander Mackenzie of Applecrofs, Alexander Mackenzie of Devockmaluack, and Rory Mackenzie of Fairbairn. The ground of his claim was, that he the respondent as nearest protestant heir was the superior of these vassals; and having remained dutiful and loyal to his majesty, he had right to the estates of the vassals attainted in virtue of the said act of parliament.

The Court of Session pronounced six decrees in favour of the respondent, decerning the estates of the six vassals to belong to him.

The appeal was brought from these six "several interlocutory sentences or decrees of the Lords of Session, pronounced the 3d day of September, and 28th and 29th days of October 1719." Entered,  
11 Feb.  
1729-30.

This appeal was the same in its merits as the former; for if the respondent was entitled to the estate of the Earl of Seaforth, he was also entitled to the estates of the attainted vassals, as a superior remaining dutiful and loyal. And the same arguments which were used in the former appeal, applied with equal force to the present.

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences or decrees complained of in the said appeal, whereby the Lords of Session found, "that the exceptant hath right to the property of the lands of Kairlochbue and Reogy which belonged to the late Sir John Mackenzie," &c. (a) be reversed. And it is further ordered, that the respondents be removed from all possession of the estates in question, which they may have obtained, and from the receipt of the rents and profits thereof, and that the said commissioners and trustees of the forfeited estates take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto, any right, title, or claim of the respondents notwithstanding.* Judgment,  
1 March  
1719-20.

In this appeal there appears to have been a dispute whether or not a seventh judgment relative to the estate of Sir Donald Mackenzie, attainted, had been pronounced by the Court of Session; the respondent produced an affidavit of Colonel Alexander Mackenzie, bearing that he had passed from and withdrawn his exception relative to that estate before any judgment was pronounced. The House of Lords dismissed the appeal as to that exception, "there being in reality no decree pronounced thereupon."

This case shews, that notwithstanding the *ipso jure* clause of devolution in the act 1700, c. 3. in favour of the protestant heir, that the papist, where there was no declarator, was entitled to acquire by forfeiture of his vassals, and to lose such acquisitions by his own forfeiture.

(a) Here the other lands, and the several former proprietors of them, are enumerated.

Cafe 62. Grizel Lady Sempill, Widow of Colonel  
 Forber, Richard Cuninghame deceased, - *Appellant*;  
 22 July Alexander Murray of Broughton, Esq; - *Respondent*.  
 1712. Fountain-  
 hall,  
 24 July  
 1712. *Et e contra.*

4th March 1719-20.

*Presumption.*—In 1691, a Colonel gives his Lieutenant Colonel a draft on his agent for 250*l.* and also pays him 50*l.* in cash, for which a receipt is granted: in a statement of all the officers' accounts in 1692, the Lieut. Col. takes no notice of the transaction in 1691, but mentions that he had received 75*l.* 12*s.* 8*d.* on account of his pay, without stating from whom: in an action, after the death of the parties, in 1719, it is held that the draft for 250*l.* was not presumed to have been paid by the drawer, unless it was otherwise instructed; but that the 50*l.* paid by the Colonel was not included in the 75*l.* 12*s.* 8*d.* acknowledged to have been received by the Lieut. Col.

*Writ.*—An objection made to a receipt between officers, that it was void, being neither holograph, nor having the solemnities required by the acts of parliament relative to the testing of writings, is not sustained.

Was a deed written and executed at Dublin valid, which bore to be "written by Edward Dudgeon, Gentleman?" *see note at the end of the case.*

**T**HE deceased Colonel Richard Cuninghame commanded a regiment of foot in Scotland from the 1st of January 1690 to the 1st of January 1691, of which James Hamilton was lieutenant-colonel.

The regiment was so ill paid during the year 1690 that the money issued by the treasury of Scotland was not sufficient for subsisting the private men, so that they lived in part upon the country where they lay; and the officers received a very small share of the pay due to them. The method of paying the regiment was by precepts or orders drawn by the Lords of the Treasury upon the Receiver-General, to pay to the colonel the sums therein mentioned for the use of the regiment; and of these precepts or orders two were issued, but not paid when the regiment was transferred from Colonel Cuninghame to his successor Colonel Buckam; one of these was for 982*l.*, which was paid on the 22d of January 1691, and another for 732*l.*, not paid till the 29th of June 1691, both to Colonel Cuninghame's agent.

The officers of the regiment conceived that they had a right to the arrears of the subsistence money for the privates, and on or previous to the 27th of June 1691 some arrangement had taken place between the colonel and lieutenant-colonel upon that subject. The evidence of this arrangement was an obligation, executed by Lieut. Colonel Hamilton, of the above date, wherein he declares, that he had received Colonel Cuninghame's precept or bill on Hugh Cuninghame, the agent, for 250*l.*, and declares that it, with other 50*l.* to be advanced by the colonel, was upon account of arrears, and obliges himself to refund proportionally of that sum, if any alteration were made in stating the accounts of the regiment.

regiment. It appeared by Lieut. Colonel Hamilton's receipt to Edward Bryce, on Colonel Cuninghame's account, that the 50*l.* were paid on the 17th of July 1691.

The payment of the arrears due to the regiment having been suspended, the officers, and among others Lieutenant Colonel Hamilton, in July 1692, assigned over to Colonel Cuninghame all their claims for service during the year 1690, to the end that he might solicit their payment; and by a back bond of the same date, Colonel Cuninghame declares, that the assignment was in trust for the use of the officers thereto subscribing, and obliges himself to make true, complete, and full payment to each of them according to the several sums there settled. Annexed to this obligation was a schedule or account of the money due to the officers and their companies, &c.; the first article of which is in the following words: "Imprimis to the lieutenant-colonel as such, and captain 252*l.*, whereof received by him 75*l.* 12*s.* 8*d.*, due yet to him 176*l.* 7*s.* 4*d.* Due on the company's account 255*l.* 3*s.* 4*d.* Rests 431*l.* 10*s.* 8*d.*" &c.; and it proceeds in the same manner with the claims of the other officers. In this transaction with all the officers, no notice is taken of the former arrangement between the colonel and lieutenant-colonel.

On the 12th of August 1693 Colonel Cuninghame assigned and conveyed to the appellant, her heirs, executors or assignees, all debts, sums of money, &c. owing to him by bond or otherwise. In virtue of this assignment the appellant claimed from the Barons of Exchequer in Scotland the arrears due to Lieutenant Colonel Hamilton, and payable out of the *equivalent*. In this claim she was opposed by the respondent, who claimed the arrears of the lieutenant-colonel by virtue of an assignment by the lieutenant-colonel to one McCulloch on 2d February 1709, which McCulloch had afterwards assigned to the respondent.

The Barons of Exchequer certified that there was due to Lieut. Colonel Hamilton a sum of 196*l.* for his personal pay; but his claim on account of the arrears for the privates' subsistence was entirely struck off. The parties having laid arrestments in the hands of the commissioners of the *equivalent*, these commissioners brought an action of multiple poinding against them before the Court of Session.

The appellant insisted that the deceased Colonel Cuninghame having given an order or bill to Lieut. Col. Hamilton for 250*l.*, payable by Hugh Cuninghame, and having likewise paid him 50*l.* in ready money, in part of his arrears, the appellant as claiming under Col. Cuninghame was entitled to the said certificate notwithstanding his back bond, in 1692, to account to Lieut. Col. Hamilton for what part of his arrears he should receive; Hamilton, having, as she contended, received from him 104*l.* more than the amount of the certificate from the Barons of Exchequer. The respondent insisted that though there was a bill drawn for 250*l.* by Col. Cuninghame, yet there was no proof that that bill was paid.

On

Appealed  
from by Lady  
Sempill.

On the 23d of December 1718, the Court "found that the precept drawn on Hugh Cuninghame for 250*l.* sterling, of which precept Col. Hamilton owned the receipt in his back boud, was not presumed to have been paid by Hugh Cuninghame unless it was otherwise instructed." And to this interlocutor the Court adhered on the 17th of February 1719.

Appealed  
from by Mr.  
Murray.

The appellant Lady Sempill then insisted that in all events, she was entitled to 50*l.* of the arrears, since it appeared by Lieut. Col. Hamilton's receipt that the same was paid him by Col. Cuninghame. The respondent contended that this 50*l.* was a part of 75*l.* 12*s.* 8*d.* allowed in the stated account in 1692, and that Col. Cuninghame consequently had already credit for the same. The Court on the 3d of July 1719, "found that the 50*l.* was not included in the 75*l.*," and to this interlocutor the Court adhered on the 17th of the same month.

Appealed  
from by Lady  
Sempill.

And on the 2d of December 1719 the Court found "that the respondent Mr. Murray had right to the certificate of Lieut. Col. Hamilton for the sum of 196*l.* deducting therefrom 50*l.* sterling allowed and found due to the appellant Lady Sempill, and found that she had right to the said 50*l.* and interest thereof, and that the respondent Mr. Murray had right to the interest of the sum found due to him, and preferred them respectively in the above terms."

Entered,  
18 Dec.  
1719.

The original appeal was brought from "two interlocutory sentences or decrees of the Court of Session of the 23d December 1718, and 2d of December 1719."

Entered,  
23 Jan.  
1719-20.

And the cross appeal from "two interlocutory sentences or decrees of the Lords of Session of the 3d and 17th of July 1719."

*On the Original Appeal.—Heads of the Appellant Lady Sempill's Argument.*

Lieut. Col. Hamilton received a precept from Col. Cuninghame deceased, for 250*l.* payable by Hugh Cuninghame, and 50*l.* in ready money in part of his arrears. It must be incumbent upon the respondent to prove that the 250*l.* bill was not paid, since it appeared under Lieut. Col. Hamilton's hand, that he had received such bill, and he is taken obliged to account so as to repay the whole, or a proportion in the certain events therein mentioned.

There are several very pregnant presumptions, that the said sum of 250*l.* was actually paid; for, one part of the money out of which it was to be paid, viz. 982*l.* contained in the treasury precept first mentioned, was at the time of drawing the bill in the hands of the person upon whom the bill was drawn, and the other for 732*l.* came into his hands two days after; and the 50*l.* was paid in a fortnight after. From that time till 1709, Col. Hamilton made no demand either against Col. Cuninghame or this appellant.

Nor can the subsequent transaction between the colonel and all the other officers in the least alter the case; for it is apparent that the agreement between the colonel and lieut. colonel was

to be kept private, to prevent giving umbrage to any of the other officers; and this made it necessary to state the Lieut. Colonel's account as it stood, without any regard to that private agreement.

*Heads of the Respondent's Argument.*

The receipt granted by the Lieut. Colonel bears a proviso; first, that in case the funds and effects out of which these two sums were to be paid should be recalled by the Lords of the Treasury, then the foresaid precept for 250*l.* was to become void, and null, and the Lieut. Colonel was to repay the said 50*l.*; and secondly, in case the officers of the regiment should thereafter procure the said precepts from the Treasury, to be applied and proportioned towards their payment, then the Lieut. Colonel was to restrict the said sum payable to him proportionally with the other officers. And that the Lieut. Colonel did not get payment of that precept from Hugh Cuninghame the agent, is clear by vouchers given into the Court, by the appellant herself, under the hands of several officers of the regiment, bearing that each of them had received their proportions of the sums mentioned in the foresaid precept granted by the Lords of the Treasury, which exhausted the amount, so that 100*l.* did not remain for the Lieut. Colonel. If the 250*l.* had been paid to the Lieut. Colonel, there is no doubt but Hugh Cuninghame would have taken his receipt for the same, as Bryce did for the 50*l.*, and given it up to the Colonel at clearing accounts with him, that the same might be brought as a charge upon the Lieut. Colonel's arrears. The appellant prayed for liberty to prove that the 250*l.* was paid to the Lieut. Colonel, and six months were allowed by the Court for that purpose, but no proof having been made, the Lords circumduced the term against her.

By the settlement or transaction of July 1692, in which the whole officers were concerned, it is plain that all accounts between the Colonel and his officers were then under consideration and settled: for if the 250*l.* precept had been actually paid to the Lieut. Colonel, as well as the 50*l.* paid by Bryce to him, then he had received more than was truly due to him: and it is not to be supposed that the Colonel would then have given him such a back bond, as before mentioned, without taking the least notice of any former payments.

*On the Cross Appeal.—Heads of the Appellant Mr. Murray's Argument.*

The receipt by Lieut. Col. Hamilton to Mr. Bryce for the 50*l.* is void by the law of Scotland, the same being neither holograph, nor subscribed before witnesses, nor the person who wrote it designed therein.

The receipt does not bind the Lieut. Colonel to hold count for that sum, but only owns the receipt thereof, and therefore discharges the same for ever, which imports that this was a debt due by the Colonel to him, and not for his arrears due by the government, which were no debt of the Colonel's.

This

only lodged in the hands of Sir Patrick Murray of Auchtertyre, a neighbouring gentleman, till the abovementioned terms should be fulfilled to the appellant; but that the respondent prevailed upon the trustee to deliver up the deed to him.

The Court of Session on the 10th of December 1717 “decerned against the appellant in the removing.” The appellant presented several bills of suspension, offering to refer the deposition to the oaths of the late Earl of Kinnoul, of Sir Patrick Murray the alleged trustee, and of the respondent himself, in whose favour the deed was made: The Court directed, that the late Earl of Kinnoul should be examined upon oath, and he accordingly deponed that he remembered nothing of any terms of deposition. The Court by several interlocutors on the 5th of March, the 3d of April, the 22d of May, and 7th of July 1718, refused the bills of suspension, as to the examination of the respondent, and Sir Patrick Murray.

Entered,  
22 Dec.  
1719.

The appeal was brought from “several interlocutory sentences or decrees of the Lords of Session of the 16th of December 1707, 10th of December 1717, 5th March, 3d April, 22d May, and 7th July 1718.”

*Heads of the Appellant's Argument.*

The afore said decree of the 16th of December 1707, reducing the appellant's title to his estate, being in absence, when the appellant knew nothing of it; and when he thought he had nothing to fear from his superior, from whom he had so lately purchased the estate, and to whom a very small arrear was due, the appellant conceives can never be sustained, either to carry off his estate, of itself, or be a valid ground of the afore said renunciation.

The renunciation never having been a delivered deed by the appellant to the respondent, it can never divest the appellant of his right in the estate, and no proof was ever offered to be made by the respondent of the delivery thereof; he would only presume it to have been delivered because it appeared in his hands. But the appellant offered to take off this, and all other presumptions whatsoever, by referring the whole facts to the oaths of the late Earl of Kinnoul, the respondent's father, of the respondent, and of the trustee in whose hands the deed of surrender was deposited.

The oath of the late Earl of Kinnoul, without the oath of the trustee, makes nothing against the appellant: his lordship does indeed depone, that he does not remember the terms of the said deposition; yet in the same oath, he refers to the deposition of the trustee, who he says is an honest man and will tell the truth.

As the afore said decrees and interlocutors appear to be contrary to law, they likewise seem to be very inconsistent with equity and justice; for though the appellant be by them stript of an estate and effects to the value of 1005*l*. sterling and upwards, as appears by the stated account herewith delivered (a), which was

(a) An account of the price and payments, &c. made by the appellant is annexed to his case.



his all: yet in none of these decrees has the respondent so much as attempted to set forth any true or valuable consideration for the same; further, than that there might (when the said decree of reduction in the appellant's absence was pronounced) be a year or two of the feu-duty in arrear, amounting to the sum of 333/6r. 8d. Scots money at most, too small a purchase for the appellant's estate, and his many years' labour and expence in improving it. Besides, the arrears were legally tendered to the superior two years before the decree of removing was pronounced, as appeared from the instrument taken thereupon; and the law allows this to be sufficient to take off any pretence of a forfeiture for non-payment of the feu duties.

*Heads of the Respondent's Argument.*

The respondent's father obtained a decree in 1707 against the appellant, voiding his right; the appellant, after that, continued to possess the premises as a tenant at will, and paid rent for the same; the appellant in 1713 executed a renunciation of all right and title he had to the premises, and that renunciation was absolute without any condition. After that time the appellant has still possessed as a tenant at will, and has run greatly in arrear, which obliged the respondent to bring his action of removing against him, whereupon he recovered judgment: and the respondent has been kept in law suits for several years, by the appellant a pauper, and the respondent will in all events be a very great loser by the appellant's obstinacy.

After hearing counsel, *It is ordered and adjudged, that the interlocutors and decrees complained of as to so much thereof, whereby probation by the oath of the respondent is refused to the appellant, or which is grounded upon such refusal, or made in consequence thereof, be reversed: and it is further ordered, that such probation be admitted, and that after examination of the respondent upon oath, the Lords of Session proceed and decree thereupon as shall be just.*

Judgment,  
16 March  
1719-20

For Appellant,      *Bat. Turnbull.*  
For Respondent,    *Rob. Raymond.      Will. Hamilton.*

Case 64. The Commissioners and Trustees of the  
 Forfeited Estates, - - - *Appellants;*  
 James Drummond, Son of James late Lord  
 Drummond, and his Trustees, - *Respondents.*

22d March 1719-20.

*Forfeiture.—Fief or Life-rent.*—A disposition is made by a father, in 1711, to a son, then a few months old, of his estate, reserving power to sell or incumber part for debts already contracted, &c. with concurrence of trustees; and reserving the grantor's life rent: in 1714, the father renounced the life-rent. By his attainder for treason the estate was not forfeited, being vested in the son.

*Papish.*—A child, a few months old, though born of Popish parents, might take an estate by disposition from his father.

*Husband and Wife.*—A life-rent or jointure granted to a wife by her son, could not be restricted by a missive letter executed by her without her husband's consent, on which a decree of declarator in absence had been taken.

ON the 28th of August 1713, James late Lord Drummond executed in favour of his son James, the respondent, who was then only a few months old, a disposition of the lands of Drummond, Stobhall, &c. heritably and irredeemably; reserving to himself a life-rent, subject to the payment of the annual-rent of the debts and other burdens, of a rent-charge of 500*l.* per annum for life to the Earl of Perth, and a jointure of the like annual sum to the Countess of Perth for life after the Earl's death. Upon this disposition infestment was taken and duly recorded upon the 13th of December 1713.

By this deed a power was reserved to the Lord Drummond to sell any part of the lands for payment of debt, or to grant heritable securities to former creditors, and to sell any part of the lands that did not lie commodious for the family, for purchasing others more convenient, subject to the same uses: but this power and faculty was not to be exercised without the consent of certain trustees named in the deed for behoof of the respondent. A list or schedule of all the debts affecting the estate was annexed to this disposition: and the Lord Drummond likewise reserved a power to give portions to younger children not exceeding a limited sum, and to settle a jointure on a second wife not exceeding 5000*l.* Scots yearly.

By a subsequent deed made in the nature of an agreement between the Earl of Perth and his son the Lord Drummond, executed upon the 11th of February and 23d of April 1714, the Lord Drummond, in consideration of an annuity or rent charge of 500*l.* per annum, granted to him during the lives of the Earl and Countess of Perth, and 1000*l.* per annum after their decease, so long as he should live, parted with his life-rent in the said estates, excepting the life-rent use of the houses and yards of Drummond and Stobhall, &c.; and the Lord Drummond became thereby obliged to

cause

cause the factors on the estate to grant bonds to the trustees named in the first deed for the respondent's behoof, to apply the rents and profits of the estate towards payment of the debts, and of the annuities before mentioned, and of the rent charge to Lord Drummond; and, accordingly, such bonds were executed by the factors to the trustees.

The Countess of Perth had by a missive letter under her hand, dated the 15th of November 1694, restricted her jointure of 500*l.* payable to her after her husband's decease to the sum of 222*l.* 4*s.* 5*d.* and the Lord Drummond having brought an action to confirm this missive letter, in 1714, obtained a decree of the Court of Session confirming the same, in absence of the Earl and Countess of Perth, who were then out of the kingdom.

By the Act 1 G. 1. c. 32. James Lord Drummond was attainted of high treason. The appellants thereupon caused the whole foresaid estates to be seized and surveyed. The respondents in virtue of the act 5 G. 1. c. 22. presented their exceptions to the Court of Session, setting forth that by the several deeds before mentioned, the late Lord Drummond the forfeiting person was not on the 24th of June 1715, (from which the forfeiture was to take place,) possessed of, interested in, or entitled unto the said estate, but that the respondent was vested in and entitled to the same, at the time aforesaid, subject to the annuity of 1000*l.* to the Lord Drummond, out of which was payable the 500*l.* jointure, to the Countess of Perth, the earl being now dead, and subject also to his life-rent in the houses, and parks of Drummond and Stobhall, &c. and consequently that no more could be forfeited. The respondents made answers that the conveyance to the respondent was only a seeming, not a real conveyance; that the respondent was disqualified to take the same by being a papist; and that the jointure to the Countess Dowager was by her said missive letter and decree of declarator thereon restricted to the said sum of 222*l.* 4*s.* 5*d.*

The Court on the 13th of August (a) 1719, " found that the  
" late Lord Drummond was by the foresaid disposition of the  
" 28th of August 1713 years, infeftment following thereon,  
" registered as said is, and articles of agreement betwixt the Earl  
" of Perth, and the late Lord Drummond his son, dated the 11th  
" day of February and 3d of April 1714 years, and by the bonds  
" granted by the Chamberlains, and by the other writs produced  
" by the respondent and his trustees divested of the fee of the  
" said estates of Perth and Drummond, and others therein  
" mentioned, and that the right of fee, property, and possession of  
" the several estates, and others in the said deeds mentioned, was  
" before the 24th of June 1715 years vested and established in  
" the person of the respondent with the burdens of the annuities,  
" life-rents, and debts therein mentioned, and find that the said con-  
" veyance in favour of the respondent is not voided nor annulled,  
" by the 3d act of Parliament 1700, intituled ' act for preventing

(a) This is the only date specified in the Cases, though in the Journal it is mentioned that there was also an interlocutor of the 11th of August.

“ the growth of popery”: and likewise found that the missive letter mentioned by the Countess of Perth to the late Lord Drummond, the respondent’s father, dated the 15th day of November 1694 years, being granted *stante matrimonio*, without her husband’s consent is void and null; and the decree of declarator following thereon being in absence, repones the Countess against the same: and therefore found and declared, that there only falls under the forfeiture of the said late Lord Drummond, an annuity of 1000*l.* sterling yearly, and the life-rent use of the houses and yards of Drummond and Stobhall, and the grafs in the parks, about the said houses, when the woods were not under haying; and as many of the flying customs and carriages, payable out of the said haill estate, as shall be necessary for the use of the family; with the burden of the said Countess Dowager’s life-rent of 500*l.* sterling yearly.”

Entered,  
18 Dec.  
1719.

The appeal was brought from “ two interlocutory sentences or decrees of the Lords of Session, pronounced the 11th and 13th days of August 1719.”

#### *Heads of the Appellants’ Argument.*

The said disposition was voluntary and only a seeming, not a real conveyance of the fee and inheritance of the said estate, contrived to evade the forfeiture; in so far as by virtue of several claims contained in the said disposition, there were reserved to the late Lord Drummond attained, as many and as extensive powers, faculties, and interests as he enjoyed by virtue of the fee and inheritance before the making of the said disposition, and such as have by several decrees of the Court of Session in other cases been found to establish an absolute right of property or fee simple. In the said disposition there is reserved to him, besides his life-rent, a power of providing for younger children, and of making a settlement on a second wife, a power of charging the estate with debts, and of selling the same or any part thereof irredeemably. There is a clause, too, whereby the rights of purchasers of lands from the said late Lord Drummond, and of creditors who accept of securities upon the estate for money lent, are secured against any objections that might arise from a want of a due application of the money advanced by such purchasers or creditors to the uses in the disposition mentioned, which renders void the limitation of the exercise of the said powers to certain uses, viz. for payment of debts, &c. and makes the said powers absolute.

Though the consent of trustees was necessary to the application of the money, yet the necessity of the consent of the trustees did not vest the property in them, nor divest the late Lord Drummond of the same, and consequently did not bar the forfeiture upon his attainder. For though a person under age cannot sell lands, or charge his estate with debts, without consent of his guardian, nor an interdicted person without consent of his interdictors, yet as both of them by remaining proprietors would forfeit their estates for high treason, so likewise the late Lord Drummond, notwithstanding

standing the limitation of exercising the said power with consent of trustees remained vested in the fee and inheritance of the said estate, and thereby could and did forfeit the same for high treason.

The respondent being a papist, descended of and educated by popish parents, was by the act of Parliament 1700, c. 3. "*for preventing the Growth of Popery*," incapable of taking an estate by virtue of any voluntary disposition or deed, and the attainted person was by the same act disabled from making any voluntary or gratuitous conveyance of any part of his heritage, in prejudice of his heirs, and consequently he was thereby disabled from making any deed of conveyance in bar of forfeiture, that being a title preferable to, and exclusive of heirs. And though the respondent be under 15 years of age, the clause enacting the disability of taking an estate by virtue of a voluntary or gratuitous disposition makes no distinction between those who are under, and those who are past the age of 15; and there is another clause in the said act, declaring that a pupil heir shall be reckoned popish, if he be under the education of papists, as the respondent is. So that the said disability takes place as to the respondent, either by admitting, or not admitting the distinction of age to take place in the said disabling clause.

The said disposition either conveys a better a right and larger estate to the respondent than would have descended to him after the death of the disponer, and in that case it is null by virtue of the said clause disabling papists to take lands by disposition, and it does not devolve to the protestant heirs: or it conveys no better right nor other estate to the respondent and protestant heir than a right of succession as heir to the estate after the death of the disponer; and in that case it is subject to all his debts, deeds, and delicts, and therefore it is not sufficient to prevent forfeiture; the right of succession of all heirs, protestant as well as papist, being barred and excluded by forfeiture for high treason. The said disposition would have been void in virtue of the second clause, if the father, the disponer, had lived without committing treason till his son the disponsee had passed the age of fifteen, and continued papist: for the protestant heir could claim nothing as heir during the life of the disponer; and it were absurd to say, that a disposition which would become void on the disponer's not committing of treason, should become valid by his attainder for high treason.

The agreement, made between the late Lord Drummond attainted and his father, can neither supply any of the said defects in the conveyance of the fee and inheritance of the said lands to the respondent, nor extinguish the life-rent reserved by it to the disponer, and much less alter any thing with relation to the powers of charging the estate with debts and selling lands; these not being so much as mentioned in the said agreement. It is evident by the tenor of this agreement, and the bonds, mentioned in the decree appealed from, to have been granted by the factors appointed by the said late Lord Drummond, that the right of

levying the rents and profits of the said estates, or of appointing factors for that purpose, remained in the said Lord Drummond attainted; and consequently the same is so far from releasing the life-rent, that it proceeds upon the supposition of his continuing to enjoy it, by laying him and his factors under obligations to apply the rents and profits to the payment of debts and other uses in the said indenture mentioned; and that only under the forfeiture of 200*l.* per annum, yielded in the said agreement by his said father out of the annuity due to him, in consideration of an exact application of the said rents and profits to the use aforesaid.

The missive letter under the hand of the Countess Dowager and decree following thereon, restricted her annuity to 22*l.* 4*s.* 5*d.*; and the life-rent of the Lord Drummond ought to be charged with no more than the said restricted sum. This letter having related to a jointure, which was to take place only after the death of her husband, and not to any thing in which the husband could have an interest *jure mariti*, his consent was not necessary. And the husband, as well as she, having been called to the action for obtaining the said decree, and having thereby had an opportunity of appearing by himself or attorney, and to declare his dissent from the said letter, his silence must be construed to import his consent, especially since he had restricted his own annuity. Though the said decree might, because of its having been passed in absence of the countess, be reduced and voided by a proper process at her suit, in case she should prove any thing unjust or iniquitous in it; yet till such suit be commenced, and judgment given upon it in her favour, it is a binding and valid decree, especially since she is no party in this cause.

#### *Heads of the Respondents' Argument.*

The late Lord Drummond having charged his estate with great debts, which increased daily by his mismanagement, a few months after the birth of the respondent was prevailed upon by his father and other friends, in order to prevent the utter ruin of the family, to divest himself of the fee of his estates, by the said disposition in favour of the respondent. But although by this deed the late Lord Drummond was fully divested of the fee of the estate, and the same vested in the respondent, if not from the date of the deed, at least from the date of the investment thereon; yet the late lord having a life-rent subject to the interest of the debts and other annual burdens, and not being careful in paying those burdens, and having the estate released of them, but misapplying the rents to other uses, the respondent's estate was still in hazard of being swallowed up and entirely exhausted by the growing interest of the debts and arrears of the other annual burdens which the late lord should have paid: and therefore the said agreement was entered into in 1714 between him and the Earl of Perth, restricting the life-rent to an annuity.

The powers which the late Lord Drummond reserved in the deed of 1713, of charging the estate with debt, and even of alienating

ing it, were purely personal faculties in the forfeiting person, which cannot be forfeited or vested in the Crown for his attainder. These powers, too, were in the person of the late Lord Drummond limited to particular ends and purposes; such as the providing for younger children and a second wife, and for discharging the debts of the estate, and purchasing lands more convenient for the advantage and profit of the respondent: and as these powers could not have been executed to any other purposes by the forfeiting person, so the Crown in virtue of his attainder can claim no benefit from them. And those powers were also limited not to be executed but in a peculiar manner; that is, with the consent of the trustees named in the deed: and therefore though all the powers that stood in the forfeiting person were deemed vested in his majesty, such powers could not be executed but with the consent of the trustees for the advantage of the respondent.

For the appellants it was contended, that though the deed of 1713 should be deemed effectual to convey the fee and property of the estate, yet the forfeiting person remained possessed of the lands in virtue of the reserved life-rent; and that the subsequent deed of 1714 being but a personal deed, not perfected by investment, the forfeiting person was not thereby divested of his life-rent: and that the respondent too, not being a party thereto, could take no advantage from it. But though for creating a life-rent, an investment be necessary; yet by the law of Scotland, investment is not necessary for divesting a person of a life-rent, which may be accomplished by a simple release, surrender, or personal deed; and by the law of Scotland a life-renter cannot convey his life-rent by an investment. By the law of Scotland, rights, obligations, releases, &c. may accrue to one person by the deed of another, without the privity or consent of the person in whose favour such deed is made; and in the present case the benefit devolved to the respondent by a formal indenture betwixt his father and grandfather. In order to extinguish the late lord's life-rent, there needed no other party to the deed than himself; any writing under his hand declaring that he parted with his life-rent would have been sufficient.

By the law of Scotland, not he who names the factor is deemed to be in possession, but he to whom such factor accounts for the rents and profits; otherwise a guardian who names a factor over the minor's estate would be deemed to be in possession, and not the minor. And, indeed, that was the respondent's case, he was an infant, his father was his legal guardian or administrator in law; and if the father as guardian named factors, it appears by the bonds given by them, that they were to account to the trustees appointed for managing the minor's estate for the rents and profits thereof.

The respondent on the 24th of June 1715 was an infant of two years of age, and consequently could not be a professed papist, nor could any formula or declaration by which he could purge himself of popery be legally tendered to, or refused by him.

Though by a subsequent clause in the act 1700, c. 3. a minor is to be deemed popish, when sprung of popish parents, if such minor be under the education of papists; yet this clause does not concern the case of infants receiving dispositions, which is to be governed by the clause enacting purgation to be made, but it relates merely to the case of minors, who are next in succession to popish persons excluded from the heritage of their ancestors, by neglecting to renounce the Romish religion; and therefore it cannot be applied to the present case.

The Countess Dowager appeared voluntarily, by her counsel, in the Court of Session, and contended that the restriction made by her in the missive letter founded on by the appellants, by which her jointure was pretended to be restricted, was by the law of Scotland void and null, because it was made during the subsistence of her marriage without the consent of her husband. In such circumstances, obligations entered into by wives, or deeds done by them, are absolutely void. Nor was this deed of restriction strengthened by the decree referred to: that decree having been obtained in absence, when the countess and her husband were out of the kingdom.

The respondents do admit, that the Court of Session had no jurisdiction, in so far as concerns the houses of Drummond and Stobhall, parks and grays thereof, in consequence of judgments given in other the like cases by the House of Lords.

Journal,  
28 March  
1719-20.

Counsel being first heard on the point of the jurisdiction, it is resolved and decreed that the Lords of Session had no jurisdiction to determine in so much of this cause as relates to the houses of Drummond and Stobhall, parks, grays thereof, and flying castoms; but that they had jurisdiction in the rest of this cause.

Judgment,  
32 March

Counsel being heard upon the merits, *It is ordered and adjudged that the petition and appeal be dismissed; and that so much of the interlocutory sentences or decrees of the Lords of Session complained of, in which this House were of opinion the said Lords of Session had jurisdiction in determining in this cause, be affirmed.*

For Appellants, *Spencer Cowper. Sam. Mead.*

For Respondent, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*

With regard to the question of jurisdiction, mentioned in this appeal, it appears that in relation to the forfeited estates the Court of Session had determined many questions, which they had no title to take cognizance of. By the act of parliament 1 Geo. 1. c. 50. appointing commissioners to enquire into and seize and survey the estates, which the traitors had been "seised or possessed of, interested in, or entitled unto," of a certain date, all persons claiming any estate, or interest of, into, or out of such estates, were directed to enter their claims or demands before the commissioners for forfeitures on or before the 24th of June 1717. By another act, 5 Geo. 1. c. 22. all persons pretending right to estates which had been seized, and that the forfeiting persons were not "seised or possessed of, interested in, or entitled to" the same, were to present their exceptions to the Court of Session before



before the 1st of August 1719, which Court was to determine the same in a summary way before the 1st of November 1719.

From misunderstanding these acts, or from some other cause, the Court of Session allowed exceptions to be brought before them in many cases, where the forfeiting persons had been "seised, or possessed of, interested in, or entitled to" the estates forfeited, whereas all claims relative to such estates should have been determined by the commissioners of forfeitures. The commissioners presented appeals against these judgments, and in 25 cases of appeal, in the present session, the House of Lords, found that the Court of Session had no jurisdiction, and therefore found their judgments null and void. In every one of these appeals counsel were called to the bar; but it is probable that cases were printed in very few of them; the nullity in most of them having been acknowledged, and a good many decided at once. Though none of the cases in question require to be reported as decisions of the High Court of Parliament on the merits, it appears that some of the judgments of the Court below are upon curious points, and all of them little known: they are further noticed at the end of this volume.

On the 15th of February 1719-20, the House of Lords ordered the Court of Session to account for their conduct for judging in causes where they had no jurisdiction; and the commissioners of forfeitures were ordered to state why they had not pleaded such want of jurisdiction. A report from the Court of Session was presented to the House of Lords on the 7th of March 1719-20, which at various different times was ordered to be taken into consideration; but it does not appear from the Journals that any thing was finally done thereon. This report is not mentioned in the acts of sederunt; but it appears that the Court of Session had great jealousy of the new court which had been erected, and of the powers granted to the commissioners of inquiry.

Acts of Se-  
derunt, 25th  
June 1720.

Case 65. The Commissioners and Trustees of the  
 Forfeited Estates, - - - *Appellants;*  
 Sir Robert Grierfon, of Lagg, Bart. - *Respondent.*

30th March 1720.

*Forfeiture—Tailzie.*—A father executes an entail in favour of his son; the son incurs an irritancy, but before declarator is stainted of treason: the Court of Session found that the estate returned to the father, though there was no declarator of the irritancy, and that the irritancy was not payable:—upon appeal, the judgment was found *null, the Court not having jurisdiction.*

The estate being held by the son upon a base infeftment from the father, the procuratory of resignation in the hands of the Crown not having been executed, and an act of parliament having declared, that the effects of *vassals* attainted were to go to *superiors* continuing loyal; the Court upon this act adjudged the estate to the father; but their judgment was reversed upon appeal.

IN October 1713, the respondent executed a voluntary settlement of his estate, in favour of his eldest son William Grierfon, whereby he conveyed his estate of Lagg, to the said William, and the heirs male of his body, whom failing to the respondent's second, third, and fourth sons respectively and the heirs male of their bodies, with several other substitutions, the last of which was to the heirs whatsoever of the respondent. By this deed the respondent reserved his own life-rent, and his son William, and the other heirs substituted, were by acceptation obliged to relieve the respondent of all his debts: for this latter purpose the deed contained a proviso, that if at any time the respondent should be distressed with horning, or other diligence for payment of debt, upon notice or intimation given thereof to William Grierfon, or the person succeeding to him, they should be obliged to relieve the respondent within six months after such notice; and the respondent reserved a power to himself to sell any part of the estate for payment of such debt, as he should be distressed for, to which sale the said William Grierfon and his successors were obliged to consent; and if they failed therein, so that the respondent should not be relieved within six months after the date of the intimation or notice given, and after the signeting of a caption upon a registered horning against him, the said William Grierfon and his successors were to forfeit their interest in the estate, and the disposition was to become void, and the respondent to return to the right and possession of the estate with power to dispose thereof as if the deed had never been executed. This disposition contained a procuratory of resignation for the purpose of obtaining new investitures from the crown, the superior, and a precept of *saline*; in virtue of which precept William Grierfon was infeft on the 29th and 30th of October 1713, and entered to possession; but he made no resignation in the hands of the crown.

The

The respondent on the 27th of April 1714, gave notice to his son William, that he was liable to be distressed for debt, and required him to concur in the sale of part of the estate, with certification in terms of the before mentioned proviso: and the respondent continuing to be distressed by hornings, captions, and otherwise, on the 12th of January 1715, renewed the said intimation and requisition; and on these several occasions, he took protests in the hands of a notary publick.

William Grierfon, having been engaged in the rebellion 1715, was on the 31st of May, 1716 convicted and attainted of high treason. The appellants thereupon caused seize and survey his estate, as vested in them for the use of the publick from the 24th of June 1715.

Against this seizure and survey the respondent in terms of the act 5 G. 1. c. 22. presented two exceptions to the Court of Session. The first was, that the forfeiting person was not on the 24th of June 1715, nor at any time since, vested, in possession of, or interested in the said estate, because his right thereto became void before that time, by neglecting to relieve the respondent at the periods when he made requisition as before mentioned. And that before the 24th of June 1715, the respondent was vested in the absolute right of the said estate by virtue of the conditions in the said disposition. The second was, that supposing the forfeiting person's right to the estate to have stood good, yet he was infest therein as vassal to the respondent; and consequently by his conviction and attainder the property which was lodged in his person was consolidated with the superiority in the person of the respondent, by virtue of the act 1 G. 1. c. 20. for "encouraging all superiors" &c.; and that, pursuant to that act the respondent had on the 22d of October 1716, obtained himself infest in the lands in question, within six months of the attainder. 5 Geo. 2;  
c. 22.

The appellants put in answers to these exceptions, and the respondent having produced four several instruments taken by a notary in the matter of the requisitions and intimations to his son, upon which also a proof by witnesses was had, the Court on the 28th of August 1719, "found it proved that the four instruments produced are true in their dates, tenors, and contents, and that the things in the said instruments affirmed to have been said and done were truly said and done as therein expressed; and found that by the facts set forth and affirmed by the said instruments, the right of the exceptant's son William was irritated and made void, and that the right and property of the said lands and estate of Lagg and others, described in the exceptions and writs to which they refer, had returned to the exceptant before the term at and from which the estates of traitors were by the act 1 Georgii vested in his majesty, and though there was no declarator of the irritancy, and found that the irritancy was not purgeable: and found that the exceptant's son William was vassal to the exceptant, holding the said lands and others of his father as superior thereof in 1713, and that the said holding was not changed before his rebellion: and  
" found 1 G. 1. c. 20;

“ found that in virtue of the act referred to in the exceptions, intituled ‘ an act for encouraging all superiors,’ &c. if the said William’s right of the property of the said lands and others had not been irritated and voided as above, the same would have been consolidated with the superiority in the same manner as if it had been by the said William resigned in the exceptant’s hands *ad perpetuam remanentiam*: and therefore decerned and declared the full right and property of the said whole lands and estate of Lagg mentioned in the exceptions and writs produced, with the whole rents, profits, and issues thereof, to pertain and belong to the said Sir Robert Grierson, the exceptant, in all time coming.”

Entered,  
28 Dec.  
1719.

The appeal was brought from “ an interlocutory sentence or decree pronounced by the Lords of Session the 28th day of August,” 1719.

#### *Heads of the Appellants’ Argument.*

In so far as the said decree has relation to the first ground on which the respondent claims, the appellants conceive the Lords of Session had no jurisdiction to determine in the case, the respondent’s claim being founded upon a right expectant upon a tailzied estate in the person attainted, to arise upon the breach of a condition: and therefore the decree so far as it is founded on that position, should be annulled (a).

The appellants conceive, that that part of the decree which has relation to the respondent’s claim as superior is erroneous, for the following reasons:

The respondent was not superior to the forfeiting person, nor the forfeiting person his vassal, according to the meaning and natural understanding of the act above recited; since by the disposition executed by the respondent, the estate was fully made over to the son, the forfeiting person, to be holden of the Crown; and although the son, for his own convenience for a time, did possess the estate by investment upon a precept or warrant from the respondent, and had not actually made a resignation of the estate into the hands of the Crown, yet since he had it in his power to make that resignation when he pleased, and to hold it of the Crown, the respondent’s claim to the superiority is but an empty name. He was denuded of it at least by a personal right which was good against him the grantor; and this personal right was by William Grierson’s treason forfeited to the Crown, and is vested in the appellants for the use of the public.

The act of parliament being intended for encouragement to superiors and vassals who should continue dutiful and loyal to his majesty, by giving the vassals a power to hold of the Crown, which they could not have had without the benefit of this act, and giving to the superior the right of property of the vassal’s estate, who should commit treason, to be consolidated with the superiority; it is plain the act has relation to such superiors as had a fixed con-

(a) *Vide note at the end of last case (No. 64.) on this point of the jurisdiction.*

tain title to the superiority, and, in consequence of it, an influence upon his vassals, and to such vassals as were tied to hold of a subject superior, and could not otherwise hold of the Crown. And, consequently, the act has no relation to the present case, where the forfeiting person was no longer tied to hold of the respondent than he pleased, and where the respondent had no right or influence as superior over the forfeiting person, longer than he thought fit, and was actually divested in the forfeiting person's favour by a deed under his own hand, though such deed remained personal.

Even supposing the forfeiting person's title or vassalage was, in virtue of the clause in the act of parliament above recited, sunk into the person of the respondent, and consolidated with his pretended right of superiority, that could signify nothing; for still the personal right to the superiority, and the power of surrendering the estate into the hands of the Crown, which was in the forfeiting person, would remain entire and be forfeited to the Crown; and, so in virtue of that personal right, the appellants would be entitled to the estate, and could by law compel the respondent to divest himself of the estate in their favours, for the use of the public.

It was objected, that by the act every superior is to have the estate as if resigned into his hands *ad remanentiam*: and that if the forfeiting person in this case had so resigned into the respondent's hands, such resignation would have given the respondent full right to the estate. But this is founded on a misunderstanding of the clause: the act does not say that the superior shall have the same right as if the vassal had made a voluntary surrender *ad remanentiam* into his hands; but that the lands or tenements holden of the subject superior, shall recognise and return into the hands of the superior; and then it describes the effects of that return and recognising, that it shall make the property be consolidated with the superiority, as if the said lands or tenements had been resigned *ad perpetuam remanentiam*. And the difference lies in this, that if the vassal made a voluntary surrender, such surrender might by interpretation be construed to be a conveyance or renunciation of all right the vassal had to that subject, supposing him to have a title distinct from the right of vassalage derived from the superior. But in virtue of this clause in the act of Parliament, the tenement being to recognise as holden of the superior, no more does return but the fee or right of vassalage: and if the vassal had any separate right distinct from it, that is not transferred to the superior. And so in the present case, supposing the forfeiting person's right of vassalage was sunk into, and consolidated with the right of superiority, yet his personal right or disposition to that very superiority, would remain entire, forfeited by his treason, and would draw along with it the full right to the estate.

#### *Heads of the Respondent's Argument.*

(The respondent is silent in his case with regard to the allegation of the appellants that the Court of Session had no jurisdiction to determine on the first ground of his exceptions, but enters into an argument in support of the interlocutor of the Court founded

founded thereon : but this it is unnecessary to detail, as it was admitted by his counsel at the bar, and found by the House that the Court in fact had no jurisdiction thereon.

On the second ground of the exceptions the respondent proceeds.)

The act founded on provides its benefits to all superiors and vassals in the most extensive words : and William Grierson being vassal in the legal sense of the word, it does not alter the case that William Grierson had a power of changing his superior and holding his lands of the crown : for since he chose originally to hold them of the respondent, so long as he continued to hold them by that tenure, he was to all intents the respondent's vassal, and would by the law of Scotland have forfeited to him his life-rent escheat, &c.

It is true, that William Grierson might in virtue of the procuratory of resignation have made himself vassal to the crown, and it is equally true, that if he had been seised of the estate by no other title, this procuratory by his attainder being forfeited to the Crown, and by statute now vested in the appellants, would have empowered them to have made resignation as is above mentioned, and would have entitled them to the estate. But then it must be observed, that William Grierson was actually seised of the estate as vassal to the respondent ; and that by the act "for encouraging all superiors" &c. made anterior to the forfeiture, the king grants the estates of vassals attainted to their superiors ; and it enacts, that the property upon the vassal's attainder shall be consolidated with the superiority. This being the case, the very act which transmitted the procuratory of resignation to the crown viz. the attainder of the vassal, did by force of the statute "for encouraging all superiors" &c. consolidate the property with the superiority, and of course barred the crown, and the appellants who claim under a grant from the crown, from asserting any right or interest in the procuratory of resignation.

Journal,  
3 March  
1719-20.

It being referred to the judges to consider whether the Court of Session, had jurisdiction in this cause, they report, "that it appeared that the exceptant claimed by two rights : the one a right expectant upon an estate tail in the person attainted to arise upon the breach of a condition, whereof we conceive the Lords of Session had no jurisdiction ; the other claim is as superior, whereof we conceive the Lord of Session had jurisdiction."

30 March  
1720.

Counsel on both sides agreeing with this opinion of the judges, on the want of jurisdiction, and being heard on the merits as to the rest of the cause, *It is resolved and decreed, that the Lords of Session had no jurisdiction to proceed and determine upon such part of the said exception as is above mentioned, and that their interlocutory sentence or decree, so far as the same is founded thereupon, be therefore declared null and void : and it is ordered and adjudged, that as to the said interlocutory sentence or decree of the Lords of Session, so far as the same is founded on that part of the exception whereby the respondent claims the said estate as forfeited to him as superior of his son William Grierson, be reversed : and it is further ordered, that the respondent be*  
removed

*removed from all possession of the estate in question which he may have obtained, and from the receipt of the rents and profits thereof; and that the said commissioners and trustees of the forfeited estates, take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto.*

For Appellants, *Ro. Dundas. Rob. Raymond.*

For Respondent. *Dun. Forbes. Will. Hamilton.*

James Farquhar of Gilmillscroft, - - - Appellant; Case 66.  
The Right Hon. Hugh Earl of Loudoun, - Respondent.

5th May 1720.

*Kirk Patrimony.*—In 1637, certain vassals in church lands advanced money to the Crown, to assist in redeeming a wadset granted to the Earl of Loudoun, the lord of erection, upon condition that they should hold of the Crown as superior, and have certain other privileges: in 1633, the superiorities of all church lands were gratuitously annexed to the Crown; and about same time vassals who should advance money for redeeming their feu duties were allowed by his majesty to treat with the treasury for that purpose, and to retain their feu duties in proportion to the sums advanced. In a question between the wadsetter and the vassals, who advanced money in 1631, it is found that they were not allowed to retain their feu duties, though they had paid money for privileges, the greatest part of which had been granted to other vassals gratuitously.

**U**PON the Reformation in Scotland, the lands, teinds, and superiorities belonging to monasteries and other religious houses, devolved to the Crown; and the greatest part of them were soon after erected into temporal lordships, in favour of certain persons called Lords of Erection. In 1608, the lordships of Keillsmuir and Barmuir, which were part of the estate which belonged to the abbacy of Melrose, was given to Hugh then Lord Loudoun, the respondent's predecessor. King Charles the First made a general revocation of all those grants as prejudicial to the Crown, which occasioning discontents, the lords of erection afterwards subscribed a deed called *The General Surrender*, whereby they submitted to his majesty (under certain restrictions) their several interests by those grants; upon which surrender the king's decrees arbitral proceeded, which were confirmed in parliament.

After this, in 1630, a contract was entered into between his then majesty and John then Earl of Loudoun, whereby the said earl agreed to resign and surrender to the Crown the right he then had to the lands, superiorities, &c. of the lordships of Keillsmuir and Barmuir, and certain jurisdictions, for which the Crown engaged to pay him 32,000 merks, being ten years's purchase; whereof 14,000 merks, in consideration of the jurisdiction of sheriffship, were actually paid, and his majesty granted a wadset

of the superiorities and feu duties of the said lordships to the earl, redeemable upon payment of the remaining 18,000 merks.

In 1631, George Reid and Robert Farquhar, the appellant's predecessor, two of the vassals, for themselves and in name of the other vassals, entered into a contract with the Crown, whereby they agreed to pay to the treasury 12,000 merks, to be applied towards the redemption of the Earl of Loudoun's wadset, the other 6000 merks to be paid by the treasury: and in consideration of the said 12,000 merks paid by the vassals his majesty became engaged to grant them new charters of their lands to be holden of the Crown, to release all claims that might arise from the breach of the conditions of their several infestments, and to give them other advantages, *provided that they should always be bound to pay their usual feu duties to the Crown.*

Pursuant to this contract, John Earl of Loudoun, was afterwards, upon the 28th of September 1633, by order of the then treasurer depute summoned to appear in St. Giles's Church, Edinburgh, at Martinmas then next, to receive his 18,000 merks. Before this term of Martinmas the king sent down his letter, dated the 8th of October 1633, directed to the lords of the treasury, and entered in the books of exchequer the 9th of November following, to this purpose, "That forasmuch as divers of the  
" vassals of erection, as his majesty was informed, were willing  
" to advance money, for buying their feu mails, to his majesty's  
" use, they having retention in their hands of their feu mails  
" for such years after the advancing of the money as in reason  
" and equity might compensate the money to be advanced by  
" them, that his majesty approved of that course, and it was there-  
" fore his pleasure that public intimation should be made to all  
" persons having interest, to the effect that such of the vassals  
" as were willing might come in and agree with the treasurer  
" and his deputy for advancing the said money, and get security  
" by act of the exchequer for retention of their feu mails, for  
" such terms as should be agreed upon." Prior to the date of this letter, the superiorities of all church lands throughout Scotland had, by the act 1633, c. 14. been annexed to the Crown.

At Martinmas 1633, the 18,000 merks were tendered to the Earl of Loudoun in St. Giles's Church, but neither he, nor any person for him, having appeared to receive the money, it was consigned in the hands of the dean of guild of the city of Edinburgh, for the earl's use, and an instrument taken thereupon. An action of declarator was also commenced against his lordship in the Court of Session, by the officers of the Crown, to have it declared, that the said wadset was redeemed.

By a second contract, in 1634, between the treasury and the then Earl of Loudoun, it was agreed that upon payment of the 12,000 merks, being the sum advanced by the vassals, the earl should surrender his right of the superiorities to the Crown, saving to himself his right to the feu duties until the other 6000 merks, for which the wadset was redeemable, should be paid. Accord-  
ingly



ingly such surrender was made by the earl of Loudoun. By a charter granted by Queen Anne, in 1707, and infestment thereon, the right of redemption of the wadset was released in favour of the respondent. And by an act of parliament 1707, c. 11. the 1707, c. 11. power of redeeming kirk lands from the lords of erection was forever renounced by the Crown.

The respondent's predecessors had all along continued to exact and receive from the vassals in the said lordships the feu mails, originally payable by them, till 1687, when the appellant stopped payment of his feu-duty, amounting to 34*l.* 9*s.* Scots annually. The appellant, in virtue of an assignment by the said George Reid in favour of the appellant's predecessor, was become entitled to the whole benefit and advantage of the said 12,000 merks, advanced by Farquhar and Reid, in terms of the contract with the treasury in 1631, for redemption of the wadset: and he contended that in virtue of the said contract, and the king's letter in 1633, he was entitled to retain his feu-duties, until he was paid the said 12,000 merks advanced to the Crown.

The respondent thereupon (after the date of his new charter in 1707) brought an action against the appellant, before the Court of Session, for payment of the arrears of his feu-duties. The appellant appeared and made defences, and after sundry proceedings the Lord Ordinary, on the 9th of July 1719, "Found that the superiorities, feu-duties, and other rents of the erected lordship of Keilsmuir and Barmuir, being wadset by King Charles the First to John Lord Loudoun for 18,000 merks in the year 1630: and albeit by the subsequent contract 1631, his majesty ordained the said wadset to be redeemed, and the feuars to furnish 12,000 merks, and the treasury 6000 merks, for redemption thereof, it was agreed that after redemption the feuars should hold of his majesty, and pay their feu-mails and duties in their infestments: and found, that the 12,000 merks being paid to my Lord Loudoun, he did, in 1634, renounce the wadset as to the superiorities, and resign the same into his majesty's hands, to the effect they might hold of the Crown; but found that the said Lord Loudoun was thereby allowed to retain the wadset right for the feu-mails and duties; which wadset and infestment was ratified in parliament, 1633, in his favour, till the wadset should be redeemed: and found by the charter under the great seal, and infestment thereon, in favour of the respondent, in 1707, the reversion of the wadset as to the feu-mails and duties is discharged, and the said duties of new disposed to him; and repelled the defences founded on the king's letter, in regard it was not alleged, that the appellant did make any agreement with the exchequer, by advancing of money and receiving a warrant for retaining their mails in terms of the said letter, the 12,000 merks being for getting right to their superiorities, and other advantages, in the terms mentioned in the contract 1631."

The appellant reclaimed: but after answers for the respondent, the Court on the 28th of July 1719 "Found that the appellant  
X " had

" had no right to retain his feu-mails and feu-duties, neither in virtue of the contract 1631, nor of the king's letter 1633; and adhered to the interlocutor of the Lord Ordinary." The appellant having reclaimed and petitioned the Court to receive summons of reduction of the respondent's new charter, the Court on the 30th of the same July and 19th of August following, " refused the desire of his petitions." And by two subsequent interlocutors on the 21st of January and 17th of February 1720, the Court " Decerned the appellant to pay to the respondent all the arrears of his feu-duties not only from the date of his new grant, but likewise for all the preceding years since the year 1687." The appeal was brought from " several interlocutory sentences or decrees of the Lords of Session of the 9th, 28th, and 30th July, the 19th August, the 21st January, and 17th February last (a)."

Entered,  
24 March  
1719-20.

#### *Heads of the Appellant's Argument.*

Although there was nothing expressly stipulated in the contract for the retention of the money to be advanced by the vassals, yet the whole strain of that contract shews the king's carefulness that the vassals should have suitable reparation. And though, perhaps, the method for it was not then resolved upon, yet it cannot be reasonably supposed that those, who advanced their money, should be worse used than others, who came later to his majesty's assistance. Nor could those little considerations, of holding immediately of the Crown, instead of the Lords of Erection, or the dispensing with irritancies, or containing their rights in six signatures, be looked upon as any compensation for their advancing so much money; since the advantage of holding of the Crown is given by act of parliament to all vassals of church-lands, as well as to those who advanced their money; and the dispensing with irritancies could concern those only who had irritancies in their charters, of whom perhaps there were few or none; and the comprehending their rights in six signatures, is calculated for small vassals; for, those that are more considerable, will not desire such a comprehension, but rather to have their own signatures by themselves.

The king's letter did very well explain his intention towards the vassals, who should advance money for the said redemption; and though it did not come till two years after the contract, yet the money which the appellant's predecessor and the other vassals were thereby obliged to advance, was not so advanced till the day that the said letter was recorded in the Exchequer.

#### *Heads of the Respondent's Argument.*

By the said contract 1631, the appellant's predecessor and other vassals covenanted to pay that sum of 12,000 merks, in order to have the privilege of holding their lands of the Crown, and for the other causes expressed in the contract itself, and never were so

(a) It appears from the Journals that the Earl of Lothian was present in the Bench when this appeal was entered; he consents that the same should be received, and to answer the same; and an order to receive, and to answer forthwith, is thereupon made.

have that sum repaid them, nor any retention of their feu-duties on that account: on the contrary it was expressly provided, that they should be bound to pay their feu-duties annually as usual.

The king's letter in 1633 had not the least relation to the appellant's case; it was written in consequence of an act of parliament in that same year, annexing the superiorities of church-lands to the Crown, reserving the feu-duties to the Lords of Erection, redeemable by the Crown at certain rates, and concerned such vassals of church-lands, as, after the date of that letter, should advance money for redemption of their feu-duties to the use of the Crown; but this letter never took effect. And supposing (which cannot be admitted) that this letter had relation to the appellant's case, yet no agreement having been made with the Exchequer, as was by that letter directed, the letter could give the appellant no power of retention. For the appellant never could have had a retention, supposing it had been covenanted to him, as it was not, until once the earl's wadset was totally redeemed, which never was done, and cannot now be done, after the said act of parliament (1707, c. 11.) and grant from her late majesty, renouncing the right of reversion.

After hearing counsel, *It is ordered and adjudged, that the said Judgment, petition and appeal be dismissed, and that the several interlocutory sentences or decrees therein complained of be affirmed.* 5 May 1720.

For Appellant, Rob. Raymond. Pat. Turnbull.  
For Respondent, Rob. Dundas. Will. Hamilton.

The Commissioners and Trustees of the  
Forfeited Estates, - - - Appellants; Case 67.  
Sir James Macdonald of Slate, Bart. - Respondent.

11 May 1720.

*Forfeiture for Treason* — An act of parliament, passed on the 7th of May 1716, enacts that the persons therein mentioned, should, under pain of attainder, surrender themselves to a justice of the peace by a day certain. A person, who had surrendered by letter to the commander in chief, before the passing of the act, and was directed to proceed to a place appointed, but who, it was alleged, was prevented by indisposition; and who never surrendered to a justice in terms of the act, was nevertheless attainted of treason.

*Proof.* — The Court having allowed a party to repeat a proof led in the same matter at issue, but in a cause at the instance of another party, in which his present opponents "did compare," the judgment is reversed.

BY the act of Parliament 1 G. 1. c. 42. intituled, "an Act for  
"the attainder of George, Earl of Marischall," &c. "of high  
"treason, unless they shall render themselves to justice by a day  
"certain therein mentioned," it was enacted that if, among  
others, Sir Donald Macdonald of Slate, should not render himself

to one of his majesty's justices of the peace, on or before the last day of June 1716, then he should from and after the 13th of November 1715, stand and be adjudged attainted of high treason, to all intents and purposes whatsoever, and should suffer and forfeit as a person attainted of high treason, by the laws of the land, ought to suffer and forfeit. And by the said act, "Every of the said justices of the peace is thereby required to commit every of them," the said Sir Donald Macdonald and others so surrendering himself to prison for the said high treason, there to remain till he should be discharged by due course of law, and thereof immediately to give notice to one of his majesty's principal secretaries of state.

This act received the royal assent on the 7th of May 1716. Previous to that date, on the 20th of April 1716, Sir Donald Macdonald wrote a letter to General Cadogan, then commander in chief in Scotland, dated from the island of Uist, of the following tenor. "Sir, understanding you were coming to Inverlochy I thought I was bound (to save you more trouble) to acquaint you by these, that I have ordered my friends and men in the isle of Sky, to go with their full arms, and deliver them to any having your orders. In the same manner I'll send over, as soon as possible, all the arms that are in this barony, and without any delay will do myself the honor to wait on you at Inverlochy; but my state of health being so very bad of a long time, and my infirmity continuing, I entreat the favour to be allowed to go by sea to Inverlochy; which having once your allowance, I promise upon honour to do without any loss of time. Thus expecting a favourable answer and passports, I am, &c. Donald Macdonald." And Sir Donald wrote a second letter to General Cadogan, on the 25th of April to the like purport. General Cadogan sent Sir Donald an answer dated the 29th of April, consenting to his request of coming to Inverlochy by sea. Sir Donald however never came to Inverlochy, nor surrendered himself to a justice of the peace, but died in the isle of Sky, on the 12th of March 1718.

The appellants seized and surveyed the estate of Sir Donald Macdonald as vested in them by virtue of several acts of parliament respecting the estates of persons attainted, and Donald Macdonald, the son of the said Sir Donald, in terms of the act 5 G. 1. c. 22. "for enlarging the time to determine claims on the forfeited estates" presented his exceptions to the Court of Session against the seizure and survey made by the appellants. He insisted that Sir Donald having surrendered himself within the time prescribed by the act of attainder, the said estate was not forfeited; and he insisted further that Sir Donald was only an heir of entail, under strict irritant and prohibitory clauses, and if he had forfeited could only forfeit during his life (a). The appellants having given in answers, the said Donald Macdonald craved leave to repeat a proof taken in an action at the instance of the Laird of

(a) This is nowhere else mentioned or insisted on in either of the appeal cases. It afterwards received determination in the well-known case of *Gordon of Park*.

M'Leod, against him in relation to the appropriation of a minister's stipend, in which the appellants were parties, to shew that Sir Donald had been incapable of surrendering himself to a justice of the peace, from the state of his health and otherwise. The question had been, in that action with the Laird of Macleod, whether Sir Donald Macdonald had been attainted or not; and several witnesses had been examined thereon. The appellants insisted, that the then exceptant could not have the benefit of the depositions made in the other cause, but that he ought to prove his exceptions in the ordinary way, that the appellants might have an opportunity to cross-examine the witnesses. The exceptant pleaded, that the proof in the former action ought to be admitted, for though there were other parties, yet the appellants were likewise parties, and the only parties who had any real interest: that the proof was taken by one of the Judges in presence of the appellants' counsel, the witnesses were cross examined and the case fully debated by them: and that as the judges were limited to determine all exceptions in so short a time, it might be impracticable, considering the distance of the place where the witnesses lived, to have them re-examined; and they were people of such character as took off any presumption, that they would swear contrary to what they had sworn formerly.

The Court on the 21st of August 1719, "allowed the appellants to prove the facts set forth in their answers and condemnation, and found that the exceptant might repeat in this process the probation already adduced by him in the process between the Laird of Macleod and him, wherein the appellants did compare, and allowed him to adduce what further probation he should think proper for clearing or fortifying the several allegiances." On the 2d of September 1719, the Court granted a commission to the appellants to examine witnesses in England. And on the 28th of October 1719, the Court found it proven that the deceased Sir Donald Macdonald, did surrender himself to the General Cadogan commander in chief by a missive letter dated the 25th day of April 1716, and that General Cadogan did accept of his surrender, and ordained him to go to the garrison of Inverlochy, and gave directions for the officers commanding there to receive him, which the general notified to the Lord Townshend, then secretary of state; and found it proven, that the said deceased Sir Donald Macdonald, was, by reason of indisposition, in no capacity to travel, without the hazard of his life, to deliver himself personally; and found it proven that he made several attempts to go to Inverlochy, but was not able to make out the voyage by reason of his indisposition, and that he continued under that incapacity of travelling to Inverlochy, till the 30th day of June 1716, and thereafter till his death; and found that several certificates of the continuance of his indisposition were from time to time sent to the governor of Inverlochy, and others in the government, and that the verity of the same is deposed upon by the grantors: and found and declared, that the said deceased Sir Donald Macdonald did

“ not fly to avoid his being apprehended and prosecuted according to law : and in regard the act of attainder *primo Georgii* against the said Sir Donald Macdonald and the other persons therein named, doth only attain such of them as should not render themselves on, or before the last day of June 1716, found and declared, that the deceased Sir Donald Macdonald, having surrendered himself as above, was not attainted by the said act, and that the publick has no right to his estate and therefore sustained the exception.”

Entered,  
21 Dec.  
1719.

The appeal was brought from “ several interlocutory sentences or decrees of the Lords of Session of the 21st of August, the 2d of September, and 28th of October, 1719.”

Donald Macdonald, son of Sir Donald, was first called as a party, but he dying the appeal was revived against Sir James Macdonald his uncle.

#### *Heads of the Appellants' Argument.*

The words of the act of parliament are plain, that if Sir Donald Macdonald and others therein particularly named, should not render themselves to one of his majesty's justices of the peace, on or before the day, therein mentioned for that purpose, they should stand attainted of high treason. The act therefore did require a rendering of Sir Donald's person to a justice of the peace, which he never did; and a submitting by letter to the commander in chief could never be called a rendering of his person. Even this pretended submission by a letter was before the act of parliament; and so was not a rendering of Sir Donald's person in obedience to that act.

Supposing it were true, that Sir Donald's indisposition was such as made him unable to take a journey in order to render his person to a justice of the peace; yet no judges of the law were empowered by any decree of theirs to supply the law, or rather alter it, by adjudging that Sir Donald's indisposition and inability to travel must stop the act of attainder from having its effect; or where the law required one thing to be done, could adjudge that the doing of another thing was equipollent.

Sir Donald was under the same indisposition when he was at Perth with the rebels, and was carried from Perth in a litter. A proof was attempted of Sir Donald's inability from indisposition to comply with the act; but yet he was able to travel to the isles to avoid his being seized, and might with much more ease have been transported some miles to have rendered his person, had he inclined to do it. When Colonel Cholmondely, and other officers of the army, were sent with troops into the isles to disarm the rebels, and were on the same island where Sir Donald was, he did not think fit to be seen by them. After the letter written to General Cadogan, he travelled through the islands of Uist and Sky, and instead of going to Inverlochry, went from Uist to Bernera and Dunholm, which are not in the way to Inverlochry, but rather the direct contrary.

*Heads of the Respondent's Argument.*

The reason of the act of attainder in the present case, and of all other similar acts, is to bring offenders to justice; and that by their flying and keeping out of the way, they might not avoid the punishment due to their crimes. Thus the recital of the act in question takes notice, that the persons therein named *had fled to avoid their being apprehended and prosecuted according to law for their offence of high treason*. This certainly can never be applied to the case in question, where the person supposed to fly from justice, and for that reason to be attainted, was so far from doing so, that he actually surrendered himself to the then commanding officer of the forces to whom; and to other officers under him, he from time to time gave an account where he was, having delivered up all his arms, and done every thing in his power to testify his submission to the government. The country was then entirely under the power of his majesty's troops; and had the commanding officer thought fit, or imagined this surrender not sufficient, he might have put him under actual custody, and the government might have brought him to trial when they pleased.

Sir Donald's case was still the more favourable, that he had made the surrender to the general, before he could know the particular directions of the act of attainder, nay, before it passed into a law: and as he was then the general's prisoner, he became disabled, though his health had been good, to surrender himself to another. Besides, there having been no justice of peace within 200 miles of him, had he attempted a journey to surrender to such justice at that distance, he might have been taken up and deprived of any benefit of his surrender, which had been accepted by the general, and in which he had reason to think himself secure. The naming of a justice of peace in the act to whom persons might surrender themselves, was certainly calculated as a favour or ease to the persons intending to surrender: for nobody can doubt that the commanding officer was as proper as a justice of peace; and General Cadogan himself was a justice of the peace.

Sir Donald never concealed himself from the officers of the army, as was alleged. On the contrary, they knew from time to time where he was. Colonel Cholmondely, who was in that country, knew where he was, had messages from him, knew of his surrender to General Cadogan, and therefore never went to take him; and he likewise at that time knew of his bad health.

The several places Sir Donald went to were directly in his way to Inverlochy; nor could he have gone any other way with safety. It was also proper for him to take the way he did, considering the state of his health, that if he grew worse, as he did, he might meet with some tolerable accommodation: but he could have had none had he gone the other way, and the method he took was the usual way of travelling in that country.

Judgment,  
11 May  
\$720.

After hearing counsel, It is ordered and adjudged, that the several interlocutory sentences or decrees complained of in the said appeal be reversed: and it is further ordered, that the respondent be removed from all possession of the estate in question, which he may have obtained (if he have obtained any) by virtue or colour of the said decrees, and from the receipt of the rents and profits thereof; and that the commissioners and trustees for the forfeited estates take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto, any right, title, or claim of the respondent notwithstanding.

**For Appellants, Ro. Dundas. Tho. Bootle,**

For Respondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

By the act 6 Geo. 1. c. 24. the king was enabled to grant the same provisions to the widow and daughters of Sir Donald McDonald, as they would have had if he had not been attainted.

**Cafe 68.** Alexander Lord Saltoun, - - - Appellant;  
William Frazer Esq; his Brother, Guardian  
and Trustee for Alexander Frazer, the Ap-  
pellant's eldest Son, - - - Respondent.

16th May 1720.

**Parent and Child.—Tutor and Pupil.**—Lord Saltoun having left 4000 *marks* at the first term after his decease, to the eldest son of the master of Saltoun, and failing him to the grantor's heirs of entail; and having appointed as uncle of the pupil to be his tutor and curator with a salary during dooms, with power to uplift the principal and interest, to employ the money in the purchase of lands, &c.: the pupil's father, the heir and executor of the grantor of the provision, was not obliged to pay over the money to the uncle without security, but to pay it to the Court of Session, who were ordered to lay it out in the manner directed by the grant.

**W**ILLIAM Lord Saltoun deceased, father of the appellant and respondent, settled his real estate, by way of entail on the appellant and the heirs male of his body, whom failing, to certain other heirs of entail therein mentioned. Having also a considerable personal estate, he executed bonds of provision in favour of his younger children, which he designed should be paid out of the personal estate.

On the 17th of May 1714, the late Lord Saltoun executed a bond for the sum of 4000*l.* sterling to Alexander Frazer his grandson, the appellant's eldest son, then and still under age, and the heirs male of his body; whom failing, to the appellant's second and third sons, and the heirs male of their bodies; whom failing, to any other heir male of the appellant's body; whom failing, to the



the respondent and the heirs male of his body; whom failing, to James Frazer, the respondent's younger brother, and the heirs male of his body; whom failing, to return to the appellant's family. The grantor declared that the sum should be payable at the first term of Whitsunday or Martinmas after his death, but should be no charge upon his landed estate; and he recited the cause of it to be, "That his grandchild after his coming at age might have an estate of his own, and not be a burden to his father." Then follow these words, "Therefore I hereby will and declare, that it is my earnest desire, that the said 4000*l*. may, as soon as it can, be employed for the buying the lands of Cairnbuilg, if the same can be got, with a sufficient security purchased therefore; which failing in the purchase of any other well-holden and well-accommodated barony of land that can be got for the said sum; and when the same is purchased, that the lands may be bought in the name and for the behoof of the said Alexander Frazer, my grandchild, and the heirs male of his body; which failing, to the other heirs male and of tailzie according to this obligation, and the whole clauses above and hereinafter contained." Then he nominates and appoints the respondent to be tutor and curator to the said Alexander Frazer, the appellant's son, during his pupillarity and minority, relative to the said bond, with power to him for the purposes therein recited to call for the said sum when he should think fit, and to intromet with the whole interest thereof, until the said Alexander Frazer should be of age, and to employ the said money upon security, or in purchasing lands as formerly recommended: and the respondent was to have allowance of his expences, and 500 merks for his own pains yearly; with a proviso, that he should not be chargeable for any omissions, but only for his actual intrusions with any part of the said sum and interest, or rents and profits of the lands so to be purchased.

On the 15th of November 1714 the late Lord Saltoun, having made up a list or inventory of bonds owing to him, did by dockets subjoined thereto direct certain bonds to be appropriated and applied for payment of the younger children's provisions, and that others should belong to Alexander Frazer his grandchild, and be delivered to the trustee for his behoof to be applied for payment of the said bond for 4000*l*.; but this notification did not amount to an assignment, and the list or schedule was scored and blotted in several places. The late Lord Saltoun died upon the 18th of March 1715.

About three years after his death, the respondent brought an action against the appellant before the Court of Session, insisting that he should be decreed to make payment to the respondent, for the use of the said Alexander Frazer, of the said sum of 4000*l*. with interest from the Whitsunday after the late lord's decease; or otherwise to make over by assignment to the respondent, for the same use, the several bonds which the Lord Saltoun by the schedule of the debts owing to him had declared should belong to the said Alexander Frazer his grandchild, and be delivered to the  
 1 trustees

trustee for his behoof, towards the payment of the 4000*l.* To this action the appellant made defences, and the Lord Ordinary on the 27th of November 1719 "Decerned the appellant to make  
 " payment and satisfaction to the respondent as tutor and administrator, for the use and behoof of the said Alexander, master  
 " of Saltoun, his pupil, of the sum of 4000*l.* sterling principal, and  
 " haill annual rents thereof, resting since the term of Whitsunday  
 " 1715, and of the same annual-rents in time coming, during the  
 " not payment thereof; or at least to make payment of the afore-  
 " said annual-rents past resting and in time coming; and in security of the said principal sum, to assign him the bonds mentioned and contained in the inventory libelled on after the form  
 " and tenor thereof." To this interlocutor the Lord Ordinary adhered upon the 10th of December thereafter.

The appellant presented a reclaiming petition, to which the respondent made answers, and the Court on the 23d of the said month of December unanimously "refused the desire of the said  
 " petition, and adhered to the Lord Ordinary's interlocutor." The appellant having presented a second reclaiming petition, the Court without answer on the 30th of the same month "refused  
 " the desire of the said petition, and adhered to their former interlocutors without prejudice to the appellant to complain in  
 " case of the respondent's mal-administration."

Entered,  
 23 Jan.  
 1719-20.

The appeal was brought from "a decree of the Lords of  
 " Session of the 27th of November, and of several interlocutory  
 " sentences or decrees of the said Lords of the 10th, 23d, and  
 " 30th of December 1719."

#### *Heads of the Appellant's Argument.*

The appellant could not pay the whole sum contained in the bond and interest, since he had purchased a part of the lands of Cairnbuilg, and some other lands adjacent thereto, for about twenty-one years purchase, agreeably to the will of his father, who very well knew what the advantage of purchasing these lands would be to his estate, by their having moss and muir inexhaustible, whereas both the moss and muir, which belonged to him, would in a few years be exhausted, and he and his tenants want fuel. And the appellant was, and is content to convey these lands to his son, which are in value above 3000*l.* sterling; but what the respondent wants is to have the money at his disposal without regard to the interest of the family.

If the respondent would purchase lands which were then to be sold lying near to the appellant's estate, he was, and is ready to pay to him the remainder of the principal sum and interest, upon his finding surety to apply the money for that end, or settling it so, as that it should be forthcoming to the minor.

If the purchase of the lands of Cairnbuilg should upon examination be judged not agreeable to the ends and purposes of the deed, the appellant was willing to bring the money into court, to be by the direction thereof settled for the use of the minor, so as the respondent should not have it absolutely in his power to misapply the

the principal sum, leaving the annual interest thereof to his management.

Though the late Lord Saltoun, at the time he executed the said deed, had bonds lying by him to the value of the sum contained therein, yet he did not think fit to convey those to the respondent for the use of his grandchild. He gave him the *jus exigendi* from none but the appellant, knowing that *he* had a greater concern that the descendants of his own body might have a plentiful estate, than it could be expected their uncle would have, and would take care that the money might be applied according to the will and earnest desire of his father.

Although any person should pass by a father, and name an administrator to a sum of money that he gifts to a child, yet such administrator by the law of Scotland, having no government of the child's person, is only manager or administrator of that sum, which is in effect as a steward for the child while he is under age. This is the case of the respondent; he has a salary allowed him for his pains, a thing inconsistent with the gratuitous office of tutor and curator, and which consequently gives the appellant a just title to enquire into his management.

The respondent alleged, that the late Lord Saltoun intended certain bonds for payment of the said sum; but that does not alter the case; for there is no doubt but he intended, that the debts due to him should be applied for payment of the said 4000*l.*; but he did not think fit to convey these bonds to the respondent for the use of his grandson, leaving that to be done by the appellant as a check upon the respondent. The list of these bonds is so much scored and blotted, that it cannot be looked upon as a deed.

Although the appellant did purchase the lands of Cairnbuilg, and other adjacent lands adjoining to it, without consent of the respondent, (which he could not get at the time,) yet they ought to be accepted as so much of the 4000*l.* since his father expressly ordered them to be purchased with part of that money; and the appellant could not acquaint the respondent at the time he purchased the same, because the respondent was then out of the kingdom, and the lands being exposed to sale, the appellant must have lost the purchase if he delayed it. Whether the respondent have the *jus exigendi* is not so much disputed, but the single question is, whether the appellant's natural right of administration, does not entitle him to inspect the management of a young man, possessed of no visible estate, endeavouring to take 4000*l.* out of hands where it is well secured for the appellant's children, without giving any account how he is to dispose of it, or security that he shall not misapply it,

#### *Heads of the Respondent's Argument.*

It is evident from the whole deed, that the Lord Saltoun intended to exclude the appellant from all pretensions to the management of the premises; and it was, no doubt, for good reasons, that he settled this part of his personal estate directly to his grandchild;

child ; passing over the appellant. By law, no guardian or administrator in trust, named by a donor, is bound to find security, and it can make no alteration in the rule of law, that the person who pretends to demand the security is father to the grantee : he is a father who was not thought fit to be entrusted in this affair, and for that reason he stands excluded.

However the appellant may imagine and plead that the money is well secured in his hand, it is evidently otherwise, since the 4000*l.* can be no charge upon the entailed estate : so that if the appellant should squander away this money, his son could have no relief.

The respondent who is named administrator in trust, with an ample and discretionary power, is better judge of the security than the appellant who stands debtor, and he must in consequence, by the trust reposed in him, secure it according to the best of his judgment. It can import nothing, whether the respondent has a visible estate of his own or not ; the late Lord Saltoun has put confidence in him as trustee, and knew very well what estate he had ; yet in fact he has a provision of two thousand pounds and upwards, which it is hoped will be more than sufficient to make up any loss by default of management, if any such shall happen, which there is no ground to suspect. In the case of the mismanagement of a guardian or trustee, the law has directed proper remedies, and the appellant may complain, if any such thing happen ; but he cannot, under colour of demanding securities from the trustee, retain the minor's money in his own hands, and debar the trustee from entering upon his office.

The lands offered by the appellant are held by a very bad tenure, and with a very insecure title, and bought at an exorbitant price ; so that the trustee could not be answerable to make such a purchase for the minor. Nor is it advisable for the minor, to have the lands conveyed to him from the appellant, seeing by the laws of Scotland, it might bring him in danger of being made liable for the appellant's debts.

Judgment,  
16 May  
1720.

After hearing counsel, *It is ordered and adjudged that the said decree, and the several interlocutory sentences or decrees affirming the same, complained of in the said appeal, be reversed ; and it is further ordered and adjudged that the appellant forthwith bring before the Lords of Session, to be deposited with their proper officer, the 4000*l.* in question, with the interest due to the time of bringing it in money, or good securities to be approved by the Court, the principal sum to be laid out with the approbation of the said Lords of Session, in as soon as conveniently may be, in the purchase of lands, according to the intention of the bond of the late Lord Saltoun, in the pleadings mentioned ; and in the mean time, until such purchase can be had, to be put out at interest, with like approbation, and the interest ; as well that to be brought in by the appellant as the future interest to grow due during the infancy of the respondent the infant, to be applied for his benefit in such manner as the Lords of Session shall find most proper for his advantage ; and afterwards the growing interest to go as the profits of the lands to be purchased, are appointed to go by the said bond : That the appellant lay before the*  
Lords

*Lords of Session, his title to the lands in Cairnbuil by him purchased, and the value thereof; and in case the Lords of Session shall approve of his title thereto, or to any part thereof, the appellant shall convey the same or such part thereof, according to the intention of the said bond of the late Lord Saltoun: And so much as the Lords of Session shall find the lands so by the appellant conveyed to be really worth, not exceeding the price paid by the appellant for the same, they shall cause to be paid back to the said appellant out of the said 4000l. so soon as such value is ascertained and conveyance made: and those lands so conveyed shall be esteemed part of the purchase directed to be made with the said 4000l., as aforesaid: And it is further ordered, that the appellant and the respondent William Fraser, may each of them have liberty to propose to the Lords of Session, from time to time, securities or purchases for the said money.*

For Appellants, *Rob. Raymond. Sam. Mead. Dun. Forbes.*

For Respondents, *Rob. Dundas. Tho. Lutwyche. Tho. Kennedy.*

**Thomas Fairholm of Piltoun, - - - Appellant; Case 69.**  
**Sir William Cockburn, and Sir George**  
**Hamilton, Baronet, - - - Respondents.**

21st May 1720.

*Mutual Contract*—*Personal and real.*—A creditor by adjudication, with an unexpired legal and without infeftment, enters 'into an agreement with two other creditors, by which he consents that they shall be paid before him; in a competition between a singular successor of the adjudger with notice, and the representatives of those two creditors, it is found that the preference in the contract was perpetual, and that as it concerned a personal subject on which no infeftment had followed, it was effectual against the singular successors of the contractors.

*Fraud.*—A creditor pursuing a judicial sale, enters into a contract before the sale to sell to a third party at a certain sum; he afterwards, at the sale, purchases for a smaller sum, but is obliged to account for the larger sum, which had been paid to him on terms of the prior contract.

*Bona fide*—A purchaser at a judicial sale having paid a debt *bona fide* to creditors ranked before him; in accounting to creditors who were prior to both, has allowance of such *bona fide* payment; but action of repetition is reserved to the prior creditors.

*Costs.*—6*l.* costs given against the appellant.

**I**N 1682, James Riddell was possessed of the estate of Kinglass; but was indebted to several persons in various sums of money. To Sir James Cockburn, and Sir Robert Mill, under whom the respondents claim, he owed a debt of 8443*l.* Scots; and Sir James and Sir Robert had used inhibition against their debtor, and he having forfeited his single and life-rent escheat to the Crown, the same was granted to them. To Walter Riddell, his brother, he owed another debt of 42,624 merks Scots, for which Walter Riddell had obtained a decree of adjudication in 1681; no infeftment had been obtained by Walter Riddell.

The creditors afterwards came to an agreement among themselves and with their common debtors, and one Dr. Livingston agreed to become tenant of the premises at a certain rent, and purchaser upon certain conditions if upon trial he was pleased with the bargain during the currency of the tack. Of same date two deeds were executed; the one a tack, whereby the debtor, James Riddell, with consent of his creditors, let to the said Dr. Livingston the estate of Kinglass for the term of seven years, at the rent of 2760 merks Scots yearly, payable to the creditors; of which rent Sir James Cockburn and Sir Robert Mill were annually to receive a greater portion than answered to the interest of their money: the other a contract, whereby James Riddell and his creditors are obliged to convey the estate to Dr. Livingston for the price of 46,000 merks Scots, if he at any time during the currency of the tack intimated his willingness to purchase: by this contract it was agreed, "upon the whole matter, and as to the persons to whom the said price shall be paid, in case of intimation as said is; and that the said bargain be consummated in manner aforesaid," that Sir James Cockburn and Sir Robert Mill should be paid the whole sums due to them, in the first place; it was further agreed, that in case Dr. Livingston should not hold the bargain, but that the same, after the expiration of the said lease, should be given to another, or that the said James Riddell could have a purchaser for certain lands and interests that he possessed in Leith, the said Sir James and Sir Robert were still to be paid what was due to them, out of either of the interests that should be first disposed of; and it was also further agreed, that Sir James Cockburn and Sir Robert Mill should adjudge the estate for their debts, and the said Walter Riddell agreed never to object to them, that the said adjudication was not within year and day of his own, but allowed them to have their payment of their just debts, as then stated and agreed to, and preserve therein the way and manner above prescribed. On the other hand, Sir James and Sir Robert agreed that their diligence should not militate against the said Walter, or his right, so as to debar him, but that both parties should take their satisfaction in the way and manner, and according to the division specified in the said lease and contract; and all the creditors were mutually bound to communicate and make forthcoming their debts and titles to each other, for the ends of this contract, and to defend against all others.

Dr. Livingston was, in virtue of the lease, put in possession of the estate; but he dying soon after, the intended bargain for the sale of the lands took no effect: however the doctor whilst he lived, and his executors during the remaining term of his lease, possessed the lands and paid the rents to the creditors. The intended sale of the lands being thus disappointed, Sir James Cockburn and Sir Robert Miln did not take adjudications on their debts.

Walter Riddell conveyed his adjudication to his four daughters, and he, or they, entered to possession of the premises. In May 1690, these daughters conveyed the adjudication and all their right

right to the premises to William Kintore; and in the conveyance to him they mentioned the said agreement among the creditors of James Riddell, which in the clause of warrandice is thus excepted: "Excepting always forth and from this present warrandice the contract above mentioned, and all clauses therein contained, whereby the said Walter Riddell stands any manner of way obliged, with this express proviso and condition, that this exception shall import no homologation by Mr. Kintore of the said contract, we, our heirs and successors, being always free as to any warrandice or performance of the same, and whereof the said Mr. William Kintore by acceptance hereof is to free and relieve us; and with the obligation of which relief this present right is hereby declared to be expressly affected."

In May 1700, Kintore conveyed his right to the premises, also with notice of the said contract, to George Clark, one of the bailies of Edinburgh; and Clark granted a back bond, that the conveyance to him was redeemable upon payment of 2666*l.* 13*s.* 4*d.* This bond Kintore conveyed to Dr. Scott, Dean of Hamilton.

In 1702 Dr. Scott, intending to redeem that right which was in the person of Clark, paid him up 1000*l.* sterling, and made an agreement that Clark should retain the right, as a security for the remainder of the sum, being 1666*l.* 13*s.* 4*d.*: and accordingly George Clark reconveyed to Dr. Scott the rights to the adjudication and lands of Kinglass, reserving to himself these rights as a security for the sum still remaining due to him.

In 1705, Thomas Fairholm, the appellant, being creditor to George Clark, obtained from him for security and satisfaction of his debt a disposition of that reserved interest which George Clark had in the adjudication which affected the lands of Kinglass; and upon this disposition was infest. The appellant, who thus had acquired right to the adjudication affecting the estate of Kinglass to the extent of 1666*l.* 13*s.* 4*d.*, was opposed in his possession by the creditors of Dr. Scott, who had become bankrupt, and he brought an action of ranking and sale against them before the Court of Session. In the ranking he was preferred by the Court to these creditors of Dr. Scott, who were the only parties, in a sum exceeding the value of the estate. After the usual steps of proceeding, the estate was brought to a judicial sale, and purchased by the appellant at a price of 1092*l.* 5*s.* 11*d.* sterling, being 18 years' purchase of a rental which had been previously proved.

Soon afterwards the appellant was sued by the executors of Sir Samuel M'Clellan, who had received from the said George Clark some right to the premises prior and preferable to that from Clark to the appellant; and, after some litigation, the Court ordained the appellant to pay to these executors a sum of 10,000*l.* Scots, which he paid accordingly.

Prior to the judicial sale of the premises, the appellant entered into an agreement with an agent of the Duchess of Hamilton, that he should purchase the said lands at such sale, and afterwards convey.

convey the same to the duchess for 44,000 merks Scots (2255*l.* 11*s.* 1*d.* sterling); and accordingly, a few months after the sale the duchess paid him this sum as the price thereof.

In 1719, the respondents, who had obtained rights to the debt which stood in the persons of Sir James Cockburn and Sir Robert Mill, brought their action against the appellant before the Court of Session for payment to them of the said sum of 8443*l.* Scots with interest from 1682, upon this ground, that by the contract before mentioned between James Riddell and his creditors on the one part, and Dr. Livingston on the other, it was agreed that the debts due to Sir James Cockburn and Sir Robert Mill should be paid out of the price of the lands preferably to the debt due to Walter Riddell; and these lands having now been sold, and the price having been recovered by the appellant in virtue of Walter Riddell's adjudication, he ought to make that sum forthcoming to the respondents; and they stated that the appellant had had sufficient notice of the said contract, not only by the recital of it in the several intermediate conveyances to him, but the same had been recorded in 1703. The appellant made defences, and the Court, after report of the Lord Ordinary, on the 6th of July 1719, "Found that the preference in the contract libelled on" "produced is perpetual, and that the said contract being concerning a personal subject, whereon no infestment follows" "that it is effectual against the singular successors of the" "tractors; but remitted to the Lord Ordinary to hear parties" "how far the appellant is personally liable." And to this interlocutor the Court adhered on the 26th of the said month of June.

Parties having accordingly gone before the Lord Ordinary, the debate being reported by his lordship, the Court, on the 20th of November 1719, "Found the price of the lands of Kinglassie" "liable to the respondents for payment of the sums for which" "they stand preferred by the contract libelled on, and found the" "appellant personally liable in as far as he had intromitted himself" "with."

The appellant then insisted, that he ought to have a deduction of the sums he had paid to Sir Samuel M'Clellan's children, who were creditors of Mr. Clark, to whom he was accountable; and the Court, on the 29th of December 1719, "Found that the" "payment to Sir Samuel M'Clellan's children by the appellant" "was made *bona fide*, and that he must have deduction of" "the said payment out of the price of the lands of Kinglassie" "serving action to the respondents against the children of" "said Sir Samuel M'Clellan for the sums received by them" "accords."

The respondents afterwards petitioned the Court that he should be accountable for the price which he had received from the duchess of Hamilton for the said lands, in terms of the agreement with her Grace, made previous to the sale. This being referred to the Lord Ordinary, and afterwards reported to the Court, their lordships, on the 22d of January 1719-20, "Found that the" "appellant



"appellant having made a previous agreement with the Ducheſs of Hamilton to ſell her the lands of Kinglaſs for 44,000 merks, and having received the ſaid ſum from the ducheſs, he is liable for the reſpondent's debts, as if the lands had been ſold at that ſum."

The appeal was brought from " ſeveral interlocutory ſentences or decrees of the Lords of Seſſion in Scotland of the 6th of June, and the 11th of November 1719, and 22d of January 1719-20." Entered,  
27 Feb.  
1719-20.

*Heads of the Appellant's Argument.*

The contract yielding a preference of the debts due to Sir James Cockburn and Sir Robert Mill was not abſolute and perpetual, but conditional only, and to take place if the ſale of the eſtate to Dr. Livingſton then projected, ſhould take effect; or if the bargain which by the ſettlement was intended for Dr. Livingſton, ſhould be given to any other perſon.

But ſuppoſing this had been otherwiſe, yet it could only have been effectual againſt, or obligatory upon Walter Riddell, the party contracting, and his heirs, but not againſt a third party purchaſing for a valuable conſideration. Walter Riddell's adjudication was the paramount title to the eſtate; and adjudications, when they become irredeemable by the expiration of the legal, and are completed heritable rights by infeſtment (a), cannot by the law of Scotland be ſubject to the effect of contracts, or other perſonal deeds of the ancient proprietors of ſuch adjudications in prejudice of a purchaſer bona fide for a valuable conſideration.

Suppoſing ſtill further, that the contract or perſonal deed of Walter Riddell could affect that adjudication whereof he once ſtood poſſeſſed, in prejudice of a purchaſer for a valuable conſideration, yet the appellant was not properly ſuch a purchaſer: he was only in right of the aſſignment from George Clarke, a creditor to Dr. Scott, in whoſe perſon the right to Walter Riddell's adjudication ſtood. However the reſpondents might have been found preferable to Dr. Scott, had they appeared and claimed that preference when the eſtate was brought to a judicial ſale; yet they having neglected to claim in that manner, and the appellant having by the proper courſe of law, as creditor, recovered payment from Dr. Scott of what was due to him out of the price of the lands, cannot be compelled to enter into an account with the reſpondents on this ſingle pretence, that the right, which they omitted to claim, was preferable to that of Dr. Scott his debtor; and therefore he could not be perſonally liable to them for the ſum ſued for.

The higheſt price offered by the appellant at the judicial ſale, for which the lands were by ſentence of the Court adjudged to have been lawfully purchaſed, is that alone which he can be compelled to account for; and he purchaſed the eſtate at the ſale,

(a) It appears that this adjudication had not been followed by infeſtment.

not as a creditor, but *tanquam quilibet* : and as he must have stood the loss if the lands had fallen in value below the price at which he purchased them at the judicial sale, he must be entitled to the profit of any more advantageous sale, which he may have made. Nor does it alter the case, that he agreed with the Duchess of Hamilton, previous to the sale, to convey the lands to her at a certain price, if he should be declared purchaser; because that bargain hindered nobody at the public roup from bidding higher: and it was in view of that advantageous bargain with the duchess that the appellant bid so high as he did, whereby the creditors were in so far benefited. And the appellant is so far from having any advantage, that considering the debt due to him, which is sunk, he still has a very hard bargain.

*Heads of the Respondents' Argument.*

Since the two creditors under whom the respondents claim, at the time of executing the contract, had not only an exclusive right to all the debtor's personal estate, and the rents and profits of his real estate during his life; but could likewise have cut off several of the debts claimed by the other creditors it could never be imagined they would have quitted all these privileges upon the view of a preference only for a limited time. That intention is supported by the words of the contract, whereby it is agreed, that in case the then intended purchaser should not hold the bargain, but that the same should be given to another (that is, sold to another) still the same preference was to subsist, and the persons under whom the respondents claim were to be paid their debts; and Walter Riddell, under whom the appellant claims, agreed never to make use of his adjudication as a ground of preference, but that both parties should take their satisfaction in the way and manner, and according to the division specified in the said contract.

An adjudication till the legal is expired, and till clothed with investment (as in the present case it was not) is but a personal right, and may be limited, restricted, or conveyed by any personal deed: besides, the appellant cannot claim the benefit of a purchaser without notice, since this contract is taken notice of in all the intermediate conveyances of this adjudication, and it is always conveyed subject to the conditions in that contract.

The appellant contended, that even Walter Riddell the adjudger would not have been personally liable for these debts, and much less ought he who received this adjudication in payment of a sum of money due to him: but though it be true, that the adjudger himself, and those claiming under him, are not by the contract personally liable; yet the estate being liable, if the adjudger had sold the estate and received the money, he must have been personally liable. And since the adjudication is conveyed to the appellant subject to that contract, and that by virtue thereof he has received the price, he ought to make satisfaction to the respondents, the creditors.

The judicial sale was merely imaginary, for the appellant was both pursuer and defender in the action for carrying it on. Dr. Scott, the person against whom that sale was carried on, had no manner of interest in the estate. The appellant, knowing that he was accountable to the respondents, and finding that the Duchess of Hamilton intended to be a purchaser, to prevent that, made a previous agreement with her grace, whereby he bound himself to dispoise the lands to her for 44,000 merks Scots, as the price, and to become purchaser at the sale for her behoof. Though he purchased for a smaller sum, yet that must not be reputed the price, since it is plain the sale was carried on with a fraudulent design, as appears from all the steps of it before taken notice of; and no Court will encourage a trustee (for such was the appellant's case) under any colour to put so great a sum in his own pocket, in defraud of creditors he knew he was accountable to: and the Court, in the action at the instance of Sir Samuel McClellan's children, decreed the appellant to be accountable for that price.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentences or decrees therein complained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 60*l.* for their costs in respect of the said appeal.*

Judgment,  
21 May  
1720.

For Appellant, *Tho. Lutwyche. Dun. Forbes.*  
For Respondents, *Rob. Raymond. Will. Hamilton.*

**Case 70.** John Campbell, of Calder, Esq; - - Appellant;  
 Ruth Pollock, *alias* Campbell, - - Respondent.

7th June 1720.

*Personal and transmissible.*—A sum appointed by a father to be paid to a son, his heirs, executors, or assignees, at a day certain, was transmissible by the son, though he died before that day.

*Pactum Illicitum.*—An estate is settled by a father upon his son and his heirs, reserving a life-rent to a certain amount, and by the son's marriage-~~contract~~ the estate is declared to be of a certain annual value: two years after the marriage the son by a deed declares that the estate was not worth so much *per annum*, but that this was done to please the wife's friends, and he grants bond to pay or allow the father to charge a sum upon the estate for provision to his younger brothers and sisters, which should be in full of legittims: this was not *contra fidem tabularum nuptialium*.

*Implied Discharge.*—After granting this bond, the father made a new disposition of the estate to the son, in same terms with the marriage-~~contract~~; but this was not a discharge of the bond, allowing the father to charge the estate with children's provision.

*Fiar absolute limited.*—In a son's marriage-~~contract~~ it is covenanted, on the part of his father that lands and hereditaments of a certain annual value were to be settled and assured so as that the same should come to and be vested in the eldest son of the marriage, and other lands and hereditaments to remain in the son's use, reserving the father's life-rent of part: the son was *fiar*, and by his bond bound the heirs of the marriage.

BY articles of marriage in the English form, executed at London, in September 1688, between Sir Hugh Campbell of Calder and Alexander his eldest son (the appellant's grandfather and father) of the one part; and Lady Susanna Lort of Turnham Green, widow, and Elizabeth Lort her daughter, of the other part; in consideration of an intended marriage between the said Alexander and Elizabeth, and of a considerable marriage-portion, it was *inter alia* agreed as follows:

That the said Sir Hugh should within three months after the said marriage well and sufficiently settle and assure manors, lands, and hereditaments of a good, sure, and indefeasible estate of inheritance in fee simple, in possession, of the yearly value of 1000 sterling, over and above all charges and reprises, to the use of Alexander the son for life, without impeachment of waste; remainder, as to part, to the intended wife for life for her jointure; remainder to the first and every other son of that marriage in tail male, with several other remainders over: and that the said Sir Hugh should in the same three months well and sufficiently settle and assure other manors, lands, and hereditaments, within Scotland, of the yearly value of 1500*l.* (over and above the first mentioned lands of 1000*l.*) to the use of the said Sir Hugh for life, and after his decease to the use of the said Alexander Campbell for life, without impeachment of waste, remainder to the use of the first and every other son of the said marriage in tail male, with several remainders over; and that in the deeds of settlement to be made of such estate there should be contained such provisions

foes, covenants, and agreements as should be necessary for carrying the said articles into effect.

The marriage accordingly took effect, and in November, 1688, Sir Hugh executed a disposition, conveying and granting to the said Alexander Campbell, and Elizabeth Lort his spouse, and longest liver of them two in conjunct fee and life-rent, and to their heirs male and of tailzie, heritably and irredeemably, certain lands in Argylshire therein mentioned: and Sir Hugh, by the same deed, conveyed and granted to his said son Alexander, and his heirs male and of tailzie, certain other lands therein mentioned. And he declared and obliged himself that all the said lands were worth 2500*l.* per annum; and Sir Hugh reserved his own life-rent in lands of 1500*l.* per annum.

The whole of the lands, so settled, were not worth the 2500*l.* which they were stated to amount to in their annual value, nor were they free from incumbrances. The appellant states, that they were only worth about 1700*l.* per annum, and charged with debts to the amount of 10,000*l.*

In June 1690, the said Alexander the son executed a deed, in which, after reciting the said marriage-articles and conveyances, it is mentioned, "That the same were only entered into to please the friends and lawyers of the said Lady Susanna Lort, that there might be no stop to the said marriage, and upon full assurance given by the said Alexander to his father Sir Hugh, of discharging him of that covenant, that the estate should be clear of all incumbrances, and likewise to give him a power to charge the said estate with provisions for younger children." In performance of this promise, the said Alexander, the son, releases Sir Hugh from the covenant or obligation to make the lands settled 2500*l.* per annum free of all debts, and accepts of the estate as it was, subject to and charged with all the debts of the said Sir Hugh both real and personal; and likewise gave his bond with a power or faculty to Sir Hugh to charge the estate settled with 2000*l.*, to be paid to such of his younger children as he should by any deed under his hand appoint and direct; and the said Alexander obliges himself to pay all the debts then owing by Sir Hugh, and all such debts as Sir Hugh should contract with his consent, and likewise the said younger children's provisions; upon condition nevertheless that this provision should be in full satisfaction of such part and share as they might claim of their father's personal estate after his decease. This deed was a private transaction between the father and son, of which Lady Susanna Lort had no notice.

In October 1691, Sir Hugh executed another settlement of his estate, in the same terms with that in November 1688, particularly engaging that the same was of the yearly value of 2500*l.*, free from all incumbrances; and upon this last deed infestment was taken. The respondent mentions, that the occasion of executing this second deed was, that certain lands had by mistake been omitted in the first. Neither this nor the former settlement were in the nature of a strict entail by the law of Scotland.

Alexander the son died before his father Sir Hugh in 1696, leaving two sons, Gilbert (since deceased) and the appellant. In November 1705, Sir Hugh by a deed executed by him, appointed 1000*l.* sterling, with interest for the same from the date thereof, to be paid to Capt. George Campbell his younger son, (then wholly unprovided for) his heirs, executors, or assignees, at Martinmas 1710, by the heirs, executors, and representatives of the said Alexander: and he gave another provision of 10,000 merks Scots to his daughter Anne.

This Capt. George Campbell, having married the respondent, with whom he had a portion of 1700*l.* which was laid out in the purchase of a commission and military equipage, on the 16th of July 1706 made his last will and testament in writing, whereby he gave and assigned to the respondent the said sum of 1000*l.*, with the interest thereof; and made her sole executrix of his will. He soon after went to Spain, on military service, and was killed at the battle of Almanza; and the respondent confirmed his testament in due form.

Payment of the said bond being refused to the respondent, she brought an action before the Court of Session thereon, and in February 1712 obtained a decree of constitution against Gilbert Campbell, the appellant's elder brother, and afterwards in January 1713, a decree of adjudication for the same. Having thereupon brought an action of mails and duties, she was now opposed by the appellant who had succeeded to the estate upon his brother's death, and who brought an action for reduction of the said bond. Before commencing this latter action the appellant served himself heir of provision and heir male in special to his father, in the barony of Calder, &c.; and at same time protested that such service should not be construed as a passing from the marriage-articles, or subjecting himself to the payment of his father's or grandfather's debts; and the grounds upon which he insisted for reduction of the respondent's claims, were, that the obligee dying before the term of payment of the bond, the same thereby became void; and that it was also void as being granted *contra fidem tabularum nuptialium*.

Upon report of the Lord Ordinary, the Court on the 7th of December 1717 " Found that the bond granted to Captain George Campbell, his heirs and assignees, in anno 1705, payable at Martinmas 1710, is binding, and was assignable by him notwithstanding he died before the said term of payment; and found, that the bond granted by Alexander to his father in anno 1690 is not reducible as being *contra fidem pactorum nuptialium*, albeit it narrates a promise given by him to his father before the marriage in respect the same was granted long prior to the marriage; and that the grantor thereof by the marriage-articles was provided to the free and full administration of the estate; and that the granting of a bond for suitable provisions to unprovided children was a rational deed; and found, that Sir Hugh Campbell's disposing the estate posterior to the bond, did not import a discharge thereof, in regard the

" bond

"bond did oblige the said Alexander the grantor personally."—To this interlocutor the Court adhered on the 8th of January thereafter.

The appellant reclaimed, and the Court, upon the 8th of February 1718, "found, that the fee of the lands and hereditaments mentioned in the marriage-articles was thereby provided to Alexander, notwithstanding of the clause, that lands and hereditaments of 1000*l.* sterling were to be settled and assured, so as that the same should come and be vested in the eldest son of the marriage, and other lands to the yearly value of 1500*l.* after the decease of Sir Hugh and Alexander were to be settled and assured so, that the same should effectually remain to the use of the said eldest son of the marriage: but found, that the private communing betwixt Sir Hugh and Alexander before the marriage, whereby Sir Hugh was enabled to grant bonds of provision to his younger children, and Alexander to become obliged to the payment of these provisions, and to undertake other burdens not mentioned in the said marriage-articles, was *in fraudem pactorum nuptialium*; and with regard to the bond granted by Alexander (though long posterior to the marriage) on the narrative of the said prior communing, and in implement thereof, bearing that the said Sir Hugh's engagements and obligations in the said articles, in so far as they were by the bond libelled, receded from, were only made and granted by him in compliance with the said Lady Susanna Lort and her lawyers and friends, that there might be no stop of the marriage, found that the said bond is not binding on the heir male of the marriage."

Against this interlocutor the respondent reclaimed, and the Court, on the 17th of July 1718, "found that the condition in the bond, that the provisions to be granted to the children should be in satisfaction of their legitim and executry that might have fallen to them, is a sufficient onerous cause to support the bond, albeit eventually there were no free moveables, the father having reserved a fund of 1500*l.* sterling, yearly, which might have afforded a fund for provisions to the children." The respondent also set forth by petition to the Court, that Sir Hugh had, subsequent to the marriage-articles, paid debts contracted before that time of a greater value than the sum in question, which ought to be looked upon as a valuable consideration for the same, and prayed diligence for proving that fact: the Court, on the 5th of December 1718, "ordained the appellant or his doers to confess or deny the fact, viz. That Sir Hugh did, after the marriage, pay debts contracted before to the value of the debt sued for." The appellant petitioned against this interlocutor, praying the Court to give judgment upon the points in dispute, without putting him to the necessity of a search through his papers to enable him to acknowledge or deny Sir Hugh's payment of some debts: but their lordships, on the 12th of December 1718, "granted diligence at the respondent's instance before answer, for proving that Sir Hugh did pay debts contracted

“ contracted before the marriage, after the marriage-settlement, to the value of the debt sued for.”

A proof was accordingly adduced, and the Court, on the 29th of January 1719-20, pronounced the following interlocutor: “ Having considered the several petitions and answers of the said parties, and the probation adduced by the respondent, and the whole writings and documents in process, especially the marriage-articles, whereby the free and full administration of the estate was agreed to be settled in the person of the said Alexander Campbell, with the bond by the said Alexander to Sir Hugh, containing a faculty to the father to grant competent provisions to his unprovided children, not exceeding 2000*l*. sterling, in full satisfaction of their legitim and portion natural, and all that could fall to them by their father's decease, and the valuable provisions and life-rent reserved to the father by the said marriage-articles, whereby he had a sufficient fund to have provided for his children, if the said bond and faculty had not been granted, *adhere* to the said interlocutor of the 17th of July, 1718; and find that the bond of provision in favour of Captain George Campbell, the respondent's husband is a binding obligation on the appellant; and therefore assize the respondent from the said process of reduction at the instance of the appellant against her.”

Entered  
3 Feb.  
1719-20.

The appeal was brought from “ several interlocutory sentences or decrees of the Lords of Session of the 7th of December 1717, and the affirmance thereof the 8th of January following; also from the interlocutors of the 8th of February 1718, the 17th of July and 12th of December 1718, and also from another interlocutor of the 29th of January 1719-20.”

#### *Heads of the Appellant's Argument.*

By the express words of the marriage-articles, Alexander the son was only to be *tenant for life, with remainder to his first and every other son*; and these articles must still be the rule, for the deeds of 1688 and 1691, executed by Sir Hugh, whereby Alexander was made tenant in tail, were not in pursuance of the said articles, but a direct violation of them.

The deed executed by Alexander the son, releasing Sir Hugh of any of the covenants in the marriage-articles, and empowering him, notwithstanding thereof, to charge the estate with debt, was, as the appellant apprehends, a direct fraud against the articles: for as Alexander, who was bound jointly with Sir Hugh in these articles, could not release Sir Hugh's covenants in favour of the issue of the marriage; so Sir Alexander being by the articles intended to be only tenant for life, he could not do any thing, nor contract any debt, to be a charge on the estate.

The grant or assignment of all Sir Hugh's personal estate could not be any valuable consideration to support that deed, even though Alexander could have done any thing to encumber the estate; because the personal estate was of no value, Sir Hugh being



being indebted to the issue of the marriage in about 25,000*l.*, the lands settled being deficient 800*l.* per annum of the value he covenanted they should be, and besides charged with 10,000*l.* of debt.

Nor is it of consequence, that Sir Hugh might after the marriage have paid debts to the value of 2000*l.* For, were that true, (which is still denied), yet he did no more than he had covenanted to do as by the articles the estate settled was to be free from all incumbrances.

*Heads of the Respondent's Argument.*

The appellant contended in the court below, that the bond being only payable at Martinmas, 1710, and the obligee dying before that time, it thereby became void, and that these words, "with power to the said Captain George Campbell and his above-written, after elapsing of the term of payment, to ask, *crave, &c. and dispose of the same,*" did imply, that the respondent's husband could only dispose or assign the bond after the term of payment was elapsed. But it is plain from the bond itself, as well as from the circumstances in which the parties were at the time of granting it, that the bond is absolute, bearing no condition, only the term of payment suspended to a day certain, which never imports a condition. There is a great difference between a bond of provision, payable at a precise time in such a year, and one payable to children at a certain age, which last has been understood to be conditional; but this bond is payable not only to George Campbell himself expressly, but to his heirs, executors, or assignees. He and the respondent were married a considerable time before the date of the bond; so that it was not to be imagined that the father designed that the bond should become void, if his son died before the time of payment; and that his wife and children, if there had been any, should have wanted subsistence, which must have been the consequence, if the bond were conditional. But the plain reason why the payment of the principal was suspended till the year 1710, was that, at the date of the bond, the appellant's elder brother was a minor, and if he had lived would have been of age before Martinmas 1710: and therefore Sir Hugh, lest his guardians should have thought themselves under any necessity of paying the principal sum for the ease of the estate, suspended the payment of it till his grandchild should be of age.

The granting of the faculty, by Alexander to Sir Hugh, was a rational deed; nothing being more just, than that the son, on whom the father had settled his whole, and even so great an estate, should consent to so small a provision as one year's rent thereof to his five brothers and sisters; nor is it every burden imposed by a son upon an estate disposed to him and the heirs of the marriage, that can be reduced as *contra fidem*; but only a burden fraudulently imposed, without either an onerous or rational cause. And as the deed was rational, so it was onerous, since it was granted with this express condition, that it should be in  
licu

convey the same to the duchess for 44,000 merks Scots (2555*l* 11*s*. 1*d*. sterling); and accordingly, a few months after the sale the duchess paid him this sum as the price thereof.

In 1719, the respondents, who had obtained rights to the debts, which stood in the persons of Sir James Cockburn and Sir Robert Mill, brought their action against the appellant before the Court of Session for payment to them of the said sum of 8443*l*. Scots, with interest from 1682, upon this ground, that by the contract before mentioned between James Riddell and his creditors on the one part, and Dr. Livingston on the other, it was agreed that the debts due to Sir James Cockburn and Sir Robert Mill should be paid out of the price of the lands preferably to the debt due to Walter Riddell; and these lands having now been sold, and the price having been recovered by the appellant in virtue of Walter Riddell's adjudication, he ought to make that sum forthcoming to the respondents; and they stated that the appellant had had sufficient notice of the said contract, not only by the recital of it in the several intermediate conveyances to him, but the same had been recorded in 1703. The appellant made defences, and the Court, after report of the Lord Ordinary, on the 6th of June 1719, "Found that the preference in the contract libelled on and  
" produced is perpetual, and that the said contract being concerning a personal subject, whereon no infeftment followed,  
" that it is effectual against the singular successors of the contractors; but remitted to the Lord Ordinary to hear parties  
" how far the appellant is personally liable." And to this interlocutor the Court adhered on the 26th of the said month of June.

Parties having accordingly gone before the Lord Ordinary, and the debate being reported by his lordship, the Court, on the 11th of November 1719, "Found the price of the lands of Kinglass  
" liable to the respondents for payment of the sums for which  
" they stand preferred by the contract libelled on, and found the  
" appellant personally liable in as far as he had intromitted therewith."

The appellant then insisted, that he ought to have a deduction of the sums he had paid to Sir Samuel M'Clellan's children, who were creditors of Mr. Clark, to whom he was accountable; and the Court, on the 29th of December 1719, "Found that the  
" payment to Sir Samuel M'Clellan's children by the appellant was made *bona fide*, and that he must have deduction of  
" the said payment out of the price of the lands of Kinglass, reserving action to the respondents against the children of the  
" said Sir Samuel M'Clellan for the sums received by them as accords."

The respondents afterwards petitioned the Court that he might be accountable for the price which he had received from the duchess of Hamilton for the said lands, in terms of the agreement with her Grace, made previous to the sale. This being referred to the Lord Ordinary, and afterwards reported to the Court, their lordships, on the 22d of January 1719-20, "Found that the  
" appellant

" appellant having made a previous agreement with the Duchefs  
 " of Hamilton to fell her the lands of Kinglafs for 44,000 merks,  
 " and having received the faid fum from the duchefs, he is liable  
 " for the respondent's debts, as if the lands had been fold at  
 " that fum."

The appeal was brought from " feveral interlocutory sentences  
 " or decrees of the Lords of Seffion in Scotland of the 6th of  
 " June, and the 11th of November 1719, and 22d of January  
 " 1719-20."

Entered,  
 27 Feb.  
 1719-20.

*Heads of the Appellant's Argument.*

The contract yielding a preference of the debts due to Sir James Cockburn and Sir Robert Mill was not absolute and perpetual, but conditional only, and to take place if the fale of the estate to Dr. Livingston then projected, should take effect; or if the bargain which by the settlement was intended for Dr. Livingston, should be given to any other person.

But fupposing this had been otherwise, yet it could only have been effectual againft, or obligatory upon Walter Riddell, the party contracting, and his heirs, but not againft a third party purchasing for a valuable confideration. Walter Riddell's adjudication was the paramount title to the estate; and adjudications, when they become irredeemable by the expiration of the legal, and are completed heritable rights by infeftment (a), cannot by the law of Scotland be fubject to the effect of contracts, or other personal deeds of the ancient proprietors of fuch adjudications in prejudice of a purchaser bona fide for a valuable confideration.

Supposing ftill further, that the contract or personal deed of Walter Riddell could affect that adjudication whereof he once stood poffeffed, in prejudice of a purchaser for a valuable confideration, yet the appellant was not properly fuch a purchaser: he was only in right of the affignment from George Clarke, a creditor to Dr. Scott, in whose person the right to Walter Riddell's adjudication stood. However the respondents might have been found preferable to Dr. Scott, had they appeared and claimed that preference when the estate was brought to a judicial fale; yet they having neglected to claim in that manner, and the appellant having by the proper courfe of law, as creditor, recovered payment from Dr. Scott of what was due to him out of the price of the lands, cannot be compelled to enter into an account with the respondents on this fingle pretence, that the right, which they omitted to claim, was preferable to that of Dr. Scott his debtor; and therefore he could not be personally liable to them for the fum fued for.

The higheft price offered by the appellant at the judicial fale, for which the lands were by fentence of the Court adjudged to have been lawfully purchafed, is that alone which he can be compelled to account for; and he purchafed the estate at the fale,

(a) It appears that this adjudication had not been followed by infeftment.

presented their exceptions to the Court of Session in Scotland, setting forth "that by an act 1 G. 1. c. 20. intituled '*An Act for encouraging all superiors, vassals*', &c. it is enacted, that if any of his majesty's subjects of Great Britain, having lands or tenements in Scotland, in property or superiority, should be guilty of the high treasons therein described, every such offender, who should be thereof duly convicted and attainted, should be liable to the pains, penalties, and forfeitures for high treason; and that every vassal and vassals in Scotland, who should continue peaceable and in dutiful allegiance to his majesty, holding lands or tenements of any such offender, who held such lands or tenements immediately of the crown, should be vested and seized, and are thereby ordained to hold the said lands or tenements of his majesty, his heirs, and successors in fee and heritage for ever, by such manner of holding as any such offender held such lands or tenements of the crown at the time of the attainder of such offender. And also stating, that the respondents held the lands of Lunan of the late Earl of Panmuire as their superior; and that the said late earl held the said lands immediately of the crown; and that therefore the respondents were entitled to hold the lands immediately of the crown, by such manner of holding as the late Earl of Panmuire held them of the crown at the time of his attainder.

The Court of Session thereupon (a) found "that on the 24th day of June, 1715, the property of the said lands of Lunan, and others mentioned and described in the said exceptions and writs foresaid, produced for the exceptants, did belong to the exceptants George and Mr. John Ogilvies; and that the samen held of the late Earl of Panmuire, attainted as their superior thereof; and find that the said exceptants did do diligence in terms of the act of parliament, anno 1 Geo. intituled '*An Act for encouraging all superiors*,' &c.: and therefore found and declared in virtue of the said act, that the exceptants George and Mr. John Ogilvies had the only right, title, and interest, to the property or *dominium utile* of the said lands, and have right to hold the samen now immediately of the crown, with the burthen of a proportion of the debts in terms of the late act of parliament, Anno 5 Georgii, intituled '*An Act for enlarging the time to determine claims on the forfeited estates*,' after the form and tenor of the above exception, acts of parliament above and therein mentioned, and writs foresaid produced for the exceptants, in all points."

The decree being extracted, the appellants brought an action for reduction thereof, setting forth that the decree was erroneous, for that the respondents never were vassals to the late earl of Panmuire, nor was the said late earl, nor any of his predecessors, superiors of the lands of Lunan since the said act of parliament, 1633, c. 14. annexing the superiorities of all church lands to the crown; but that since that time the crown was superior of the lands of Lunan, and that consequently

(a) No date to this interlocutor is given in the Appeal Case.

the respondents were not within the provisions of the Act for encouraging all superiors, vassals, &c : And that the respondents had not obtained themselves infest within the time limited by the act of parliament.

The respondents made defences, contending that though by the act 1633, the superiorities of church-lands were annexed to the crown, and that act was ratified by another act in 1661, yet there is a proviso in the last recited act in these words, " It is always declared, that notwithstanding of this act, any who have gotten or shall get any new infestment of superiority of Kirklands the same shall stand good as to such vassals, who have given their consents to the said right of superiority," and that the case of the respondents was comprehended under this proviso : for one Guthrie under whom they claim, in the year 1614 consented to the Marquis of Hamilton's right of superiority (in whose place the late Earl of Panmuire came) by accepting a charter from the said marquis and being infest thereon (a). And, that although the respondents did not obtain themselves infest within six months after the attainder, yet they offered a charter in the exchequer to be passed in the ordinary form within six months after the attainder of the late Earls of Panmuire which was proved by two witnesses ; and that this was *doing diligence to attain possession, in terms of the act of parliament.*

The Court thereupon, on the 31st of October, 1719, found, " that there was no ground for a reduction."

The appeal was brought from, " an interlocutory sentence or decree of the Lords of Session pronounced the 31st of October 1719."

Entered,  
18 Dec.  
1719.

#### *Heads of the Appellants' Argument.*

The respondents did not hold the lands of Lunan of the late Earl of Panmuire, they having never been infest as vassals to him; and therefore they can claim no benefit from the clause in the act 1 Georgii, which is only in favour of vassals, holding lands of a subject superior attainted for treason.

After the act 1633, neither the ancestors of the late Earl of Panmuire, nor himself, were superiors of the lands of Lunan, but the crown was superior, and continues so to this day.

With regard to the proviso in the act 1661, that proviso has a plain relation to new infestments of superiority, granted by the crown, with consent of the vassals, to the Lords of Erection after the year 1633, but hath no manner of relation to infestments granted before the year 1633, those, so far as concerns the superiorities being entirely made void by that act. The respondents did prove that Guthrie, in whose right they claim, was infest by a charter from the Marquis of Hamilton in the year 1614 : but they do not prove that the late Earl of Panmuire, or any to whom he succeeded, did obtain a new infestment from the crown of the superiority of Lunan, with consent of the vassal ;

(a) It does not appear that any charter or precept subsequent to this had been received by the vassals.

and except that had been done, the late Earl could not be superior, or have any benefit by the aforesaid proviso.

With regard to the respondent's having offered a charter to the exchequer, the act of parliament requires, that a vassal should obtain himself infeft within six months after the attainder of his superior, which the respondents have not done: and the presenting a charter in the exchequer was not obtaining themselves infeft, nor a doing diligence to attain possession. Nor have those words in the act of parliament, *do diligence for attaining possession*, any relation to vassals, but to superiors: vassals were to obtain themselves infeft: superiors to do diligence for attaining possession.

But if the respondents did present a charter to be passed in the exchequer within six months after the late Earl of Panmuire's attainder, no reason can be given why that charter was not passed, and the respondents infeft thereon, other than this that the Court of Exchequer refused to pass it, in regard the respondents are not in the case provided for by the act of parliament *for encouraging all superiors, vassals, &c.*, as they were not vassals to the said late earl, nor he their superior. And it is certain in fact that the exchequer did refuse to pass charters upon that act of parliament to others, who were in the same circumstances with the respondents, judging them not entitled to such charter, and their case not comprehended within the act of parliament.

The appellants therefore conceive, that the respondents are only entitled to hold the lands of the crown in the same manner as they were holden before the attainder of the late Earl of Panmuire, and that the respondents ought to pay the same feu-duties to the appellants for the use of the publick, that they were obliged and used to pay to the late Earl of Panmuire before his attainder.

Judgment,  
14 Dec.  
1720.

*Whereas this day was appointed for hearing counsel upon this petition and appeal, as also upon the answer of the respondents; counsel appeared for the appellants, and were heard (none attending for the respondents), and being withdrawn; after due consideration had of what was offered in this case, it is ordered and adjudged, that the interlocutory sentence or decree complained of in the said appeal be reversed; and it is declared that the respondents are entitled to hold the lands in their exceptions mentioned of the Crown, in the same manner as they were holden before the attainder, of the late Earl of Panmuire; and that the respondents ought to pay the same feu-duties to the appellants for the use of the publick, that they were obliged and used to pay to the late Earl of Panmuire before his attainder.*

For Appellants, *Phi. Yorke. Ro. Dundas.*

*Ex parte*

The Commissioners and Trustees of the Forfeited Estates, - - -

*Appellants;*

Case 72.

Sir James Mackenzie of Royston, one of the Senators of the College of Justice, - -

*Respondent.*

19th December 1720.

*Forfeiture for Treason.—Recognition to a loyal Superior.—1 Geo. 1. c. 20.—An act of parliament having enacted, that the lands of those guilty of high treason, held of subject superiors, should recognise and return into the hands of the subject superior who continued loyal; John Grant, an attainted person, held his lands of Alexander Mackenzie as his immediate superior: this Alexander was also attainted, and he held of Lord Royston as his superior, Lord Royston holding of the Crown: by the attainder of Grant, Lord Royston was not entitled to the property of Grant's estate, but the same was forfeited to the Crown.*

JOHN GRANT of Glenmoristoun, proprietor of the lands of Auchnacaldan, &c. being attainted for high treason, the appellants caused his estate to be surveyed as vested in them for the use of the public.

The respondent presented his exceptions to the Court of Session stating that John Grant, the forfeiting person, did hold the premises of Alexander Mackenzie of Fraserdale, who was likewise attainted for high treason, and that Alexander Mackenzie of Fraserdale held the same lands of the respondent as his superior: and contending, that as the said Alexander Mackenzie and John Grant were so attainted he the respondent had right to the lands and estate of the said John Grant, in virtue of a clause in the act of parliament, 1 G. 1. c. 20. intituled *‘An act for enforcing all superiors, vassals,’* &c. whereby it is enacted, “that if any subject of Great Britain holding lands or tenements of a subject superior in Scotland has been or shall be guilty of such high treason or treasons (as in the said act mentioned) every such offender who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures for high treason, and his lands or tenements, held of any subject superior in Scotland, shall recognise and return into the hands of the superior, and the property shall be and is thereby consolidated with the superiority, in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of his superior *ad perpetuam remanentiam* :” and the respondent therefore prayed that the premises might be adjudged to belong to him as superior, in terms of the said act of parliament.

To these exceptions the appellants made answers; and the Court, on the 20th of August 1719, “found that the exceptant had right to the property of the forty-shilling land of Auchnacaldan, &c., part of the barony of Glenmoristoun, which were holden

“ holden of the exceptant, as immediate superior by Alexander  
 “ Mackenzie late of Fraferdale, and of the said Alexander Mac-  
 “ kenzie by John Grant late of Glenmoristoun; by the attainder  
 “ and conviction of the said John Grant late of Glenmoristoun,  
 “ and Alexander Mackenzie late of Fraferdale, since the  
 “ 24th day of June 1715 years, and before the 21st day of June  
 “ 1718 years, for treason committed before the 1st day of June  
 “ 1716 years: and found that the exceptant had right to the  
 “ rents, profits, and issues payable for the said lands and others  
 “ from and since the said 24th day of June 1715 years, with the  
 “ burden of a proportion of the debts, in the terms of the act of  
 “ parliament 5 Geo., intituled ‘ *An act for enlarging the time to*  
 “ *determine claims on the forfeited estates;*’ and found, that the  
 “ public had no right nor interest therein by the attainder or  
 “ conviction of the said John Grant late of Glenmoristoun, and  
 “ Alexander Mackenzie late of Fraferdale; and therefore suf-  
 “ tained the exception presented by the said Sir James Macken-  
 “ zie; and found, decerned, and declared accordingly.”

Entered,  
 21 Dec.  
 1719.

The appeal was brought from “ an interlocutory sentence or  
 “ decree of the Lords of Session, pronounced the 20th of August,  
 “ 1719.”

*Heads of the Appellants' Argument.*

John Grant, the forfeiting person, whose estate the respondent claims, did not hold that estate of the respondent as superior, but of Alexander Mackenzie of Fraferdale, and therefore the estate could not recognise or return into the respondent's hands by the treason or attainder of John Grant.

If the said John Grant's estate had recognised by his treason or attainder to any subject superior, then it must have recognised to Alexander Mackenzie of Fraferdale, he being John Grant's superior. But Alexander Mackenzie having rendered himself incapable of claiming that benefit by his going into the rebellion himself, the act of parliament takes no place as to the estate of John Grant: that estate is forfeited to the Crown, and to no subject superior.

The appellants do admit, that in so far as Alexander Mackenzie was interested in the estate, his right does recognise and return to the respondent; but no more can return to the respondent than what belonged to Alexander Mackenzie; that is, the right of superiority, but not the right of property, which belonged to John Grant.

The respondent contended, that though the estate would not have belonged to him by the treason and attainder of John Grant alone, yet Alexander Mackenzie, immediate vassal to the respondent in that estate, and immediate superior to John Grant, being likewise attainted, the respondent thereby became superior to John Grant, and as such was entitled to the benefit given by the act of parliament. But this proceeds upon a mistake, as if the right and vassalage holden by John Grant of Alexander Mackenzie, were, by the treason of John Grant, extinguished, and con-  
 solidated



olidated with the right that was in the person of Alexander Mackenzie. This, however, will not hold, for the act of parliament only declares the right of the vassal to be consolidated with the superiority, where the superior did continue loyal and dutiful: but Alexander Mackenzie having been guilty of treason, this guilt did hinder John Grant's right of vassalage from being consolidated with Alexander Mackenzie's right of superiority; and that right of vassalage does still subsist, and is forfeited to the Crown. Nor can the respondent ever claim the estate of John Grant by the attainder of Alexander Mackenzie, unless he can first make it appear that John Grant's estate was lodged in Alexander Mackenzie's person.

A petition was presented to delay the hearing, by the respondent's agent, praying, " In regard the petitioner has not received " the remittances from Scotland he expected, and being unable " to raise money at this juncture for defraying the expences in " this cause; that the time for hearing the same may be en- " larged." The House being informed, that the appellants' council were attending, proceeded to hear the appeal, and made the following order thereon :

Whereas this day was appointed for hearing counsel upon this judgment, appeal, as also upon the answer put in thereto; counsel appeared for the appellants and were heard (none attending for the respondent), and being withdrawn; after due consideration of what was offered in this case, it is ordered and adjudged, that the interlocutory sentence or decree complained of in the said appeal be reversed.

For Appellants, *Ro. Dundas. Sam. Mead.*

The Commissioners and Trustees for the  
Forfeited Estates,                 -                 -                 *Appellants;*  
Sir George Stewart of Balcasty Bart. Heir  
of John Stewart Esq; of Grantully, de-  
ceased,                 -                 -                 -                 *Respondent.*

**Case 73.**

21st Dec. 1720.

*Forfeiture for Treason.—Recognition to a loyal Superior.*—1 G. 3. c. 20.—An act of parliament gave to superiors, continuing dutiful and loyal, the estates of attainted vassals: to a vassal claiming the estate of his vassal, it is objected, on the 12th of September 1719, that he had not continued dutiful and loyal, but had corresponded with the Pretender, entertained him at his house, and given him a present of plate: the Court of Session, on the 29th of October, two days before their powers expired, granted the objectors a proof; and no proof being adduced on the 31st, circumstanced the term against them; and decreed in favour of the claimant: the judgment is reversed.

**JOHN STEWART**, late of Kynachin, attainted, was seized and possessed of the lands of Borlick, and Mill thereof, which he held of John Stewart of Grantully, as his superior.

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**John**

John Stewart of Kynachin being attainted of high treason in 1716, John Stewart of Grantully as superior, in terms of the act of parliament 1 G. 1. c. 20. "for encouraging all superiors" &c., claimed the said lands of Borlick and Mill thereof as recognised and returned into the hands of the superior, and that the property was consolidated with the superiority, in the same manner as if they had been resigned in the hands of the superior *ad perpetuum remanentiam*. He also obtained himself inest in the premises, and did diligence in manner pointed out by the act, by means of which he attained possession.

The estates of all persons attainted having been by act of parliament vested in the appellants, for the use of the publick, they caused seize and survey the said lands of Borlick and Mill thereof, as belonging to Stewart of Kynachin the attainted person. John Stewart of Grantully, the superior, thereupon in pursuance of the act 5 Georgii, c. 22. intituled "an act for enlarging the time for determining claims on the forfeited estates." presented his exceptions to the Court of Session against such seizure and survey, insisting upon his right to the lands in question, in terms of the act for "encouraging all superiors," &c. The appellants on the 12th of September 1719, put in their answers to these exceptions, admitting John Stewart of Grantully's right of superiority, and that he had done diligence in the terms prescribed by the act; but they contended that he was not entitled to the premium contained in the act for "encouraging all superiors," &c., which was only intended for superiors continuing "dutiful and loyal;" whereas, as the appellants insisted, John Stewart of Grantully had not continued dutiful and loyal, but had corresponded with the pretender, entertained him at his house when in Scotland, and sent him a present of plate, &c.

When the cause came to a hearing, the counsel for John Stewart of Grantully denied the several facts charging him as undutiful and disloyal, and contended that he had always behaved as became a good subject; but they insisted further, that though the facts stated by the appellants had been true, yet that no proof could be taken of them, as they inferred the crime of high treason, which could only be tried by a jury; they also pleaded that a proof and prosecution for these alleged facts was barred by the act of indemnity, in none of the exceptions to which the exceptant was named. On the 29th of October 1719, the Court "found, that such facts as may infer undutiful and unpeaceable behaviour to his majesty, may still be proved by the publick, notwithstanding of the indemnity, in order to debar the said John Stewart of Grantully from the premium allowed to dutiful superiors by the act 1<sup>st</sup> Georgii, intituled "an act for encouraging all superiors, vassals," &c. and before answer granted warrant for letters of first and second diligence for the publick to prove the facts alleged in their answers, or any other that can import undutiful and unpeaceable behaviour of the said John Stewart of Grantully to his majesty, to be reported against Saturday next the 31st of October." By act of parliament

this

This was the last day on which the Court of Session could hear or pronounce judgment upon these exceptions.

The cause being accordingly called on the 31st of October 1719, and no proof having been produced for the appellants, the Court "circumduced the term against them for not proving in terms of their former interlocutor; and found that in virtue of the acts of parliament referred to in the exceptions, the respondent has right to the property of the lands of Borlick and others contained in the exceptions and vouchers thereof, which were holden of the said John Stewart of Grantully, by John Stewart late of Kynachin now attainted; and found that the said John Stewart of Grantully had right to the rents, profits, and issues payable for the said lands and others from the said 24th of June 1715, and in time coming, with the burden of the debts in terms of the late act of parliament, anno 5to Georgii, intituled "an act for enlarging the time for determining claims upon the forfeited estates."

The appeal was brought from an interlocutory sentence or decree of the Court of Session of the 31st of October 1719.

Entered,  
21 Decr  
1719.

#### *Heads of the Appellants' Argument.*

The Court of Session did not admit the appellants to the proof of the disloyalty of John Stewart of Grantully, when they gave in their answers upon the 12th of September 1719, but delayed giving their judgment till the 29th of October, and they then gave the appellants only two days time to prove the several facts of disloyalty insisted upon, when at the same time, they could not in that space bring evidence of these facts from a remote county, where Stewart of Grantully lived.

#### *Heads of the Respondent's Argument.*

Though John Stewart of Grantully thought he had very good reason to appeal against such part of the judgment as allowed any proof of the facts insisted upon, which was in a manner proving treason against him in an irregular way after the indemnity, and after the three years limited for such prosecutions; yet he, conscious of his own innocence submitted to this irregular mode of inquiry. But when that liberty was granted, the appellants did not aim at examining one witness, or take out any order for that purpose; though doubtless there were at that time in Edinburgh abundance of people thoroughly conversant with Stewart of Grantully's behaviour during the whole time of the rebellion. As to the shortness of the time the appellants complain of it without any ground, for when this cause was first under the consideration of the Court, the appellants did not pray for a commission to examine witnesses; and when the Court, after an adjournment, met again on the 22d of October, yet the appellants never endeavoured to bring on the cause, or prayed for such commission, though they knew that the Court was limited to determine all these cases before the 1st of November. When the cause was at length heard, the Court indulged the appellants with the commission

they asked but they made no use of it. Notwithstanding the shortness of the time, which was all that the judges could give, if there had been any ground for this inquiry, there is no doubt but the appellants would have had their witnesses in readiness; and any negligence on their part cannot hurt the respondent, or deprive him of the benefit allowed by act of parliament to superiors, since he has done every thing which that act required.

Judgment,  
21 Dec.  
1720.

After hearing counsel, *The question was put, whether the said decree shall be reversed: it was resolved in the affirmative.*

For Respondent. *Sam. Mead. Will. Hamilton.*

The report of this cause was taken from the printed case for the respondents only; that for the appellants could not be found, after a search in several publick and private libraries.

**Case 74. The Commissioners and Trustees of the**

Foster's  
Crown Law,  
p. 82.

Forfeited Estates,

*Appellants;*

Patrick Farquharson late of Invetay, Esq;

*Respondent.*

9th Jan. 1720-1.

*Falsa Demonstratio.—Mistomer.*—The attainder and forfeiture of *Alexander Farquharson*, did not affect a person of the same surname and description, but bearing the Christian name of *Patrick*.

Vide Com-  
missioners  
of Forfei-  
tures v. Gor-  
don. No. 68  
hæc.

**BY** an act of parliament 1 Geo. 1. c. 42., it was enacted, that if amongst others, *Alexander Farquharson* of Invetay, should not render himself to one of his majesty's justices of the peace, on or before the last day of June 1716, he should stand attainted of treason from the 12th of November 1715. By virtue of two other acts of parliament 1 Geo. 1. c. 50., and 4 Geo. 1. c. 8, the appellants seized and surveyed the respondent's estate as vested in them, by the attainder of *Alexander Farquharson*.

The respondent in terms of the act 5 Geo. 1. c. 22. presented his exceptions to the Court of Session, setting forth his title to the lands so seized and surveyed, and contending that the attainder of *Alexander Farquharson* did not affect him; and the Court on the 19th of August 1719, gave judgment in his favour.

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session of the 19th of August 1719.

Entered,  
18 Dec.  
1719.  
Judgment,  
9 Jan.  
1720-21.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the interlocutory sentence or decree therein complained of be affirmed.*

This appeal is on a point precisely similar, with that against *Alexander Gordon* of Auchintoul, 25th February 1719 20,

No.

No. 60 of this Collection, it is not necessary to be further stated. No printed cases in the present appeal were found; perhaps none might be printed.

The Commissioners and Trustees of the  
Forfeited Estates, - - - *Appellants;* Case 75:  
John Hog, Merchant in Edinburgh, - *Respondent.*

18th Jan. 1720-21.

*Trust.—Forfeiture for Treason.*—A disposition held ineffectual to convey an estate, which was executed by a trustee, and not consented to by the truster.

UPON the attainder of the Viscount of Kenmuir for high treason, the appellants caused seize and survey the ancient estate of the family. The respondent by virtue of the act 5 G. 1. c. 22. put in his exceptions to the Court of Session, against the said survey, in so far as concerned some houses and lands, lying near the town of New Galloway. He stated that he had purchased these houses and lands from George Hume of Whitfield, with consent of Captain James Dalzell; and he produced a disposition in his favour with sasine thereon, dated in 1712. Both these persons were attainted after that date, for high treason.

The appellants stated in answer to this, that the estate of Kenmuir, was about the year 1643, charged with so much debt, that it was judged expedient to purchase decrees of apprising to be held by a trustee for the behoof of the Viscounts of Kenmuir. That accordingly a decree of apprising was purchased for this purpose in 1646, which after some mesne conveyances came to the hands of George Hume of Whitfield, still as a trustee; and he was seised in the estate by virtue of a charter from the crown in 1701. That this George Hume, in 1711 transferred his trust right to Captain James Dalzell, but the latter was not infeft; and that the conveyance by Hume and Dalzell to the respondent was void, being made by the trustee, without any consent by the viscount of Kenmuir.

The Court of Session on the 15th of September 1719, “found  
“that neither William late Viscount of Kenmuir, George  
“Hume of Whitfield, nor Captain James Dalzell, were entitled  
“unto the tenements and acres mentioned in the exception, in  
“their own right, or to their own use, or any other person in  
“trust for them on the 24th of June 1715, or at any time since;  
“and found that the respondent was then, and has been ever  
“since, vested in the right of property of the premises.”

The appeal was brought from “an interlocutory sentence or  
“decree of the Lords of Session, made the 15th of September  
“1719.”

Entered,  
18 Dec.  
1719.

(In this appeal the appellants' case only was found; it stated some of the circumstances on which the allegation of trust was founded, but too indistinctly to be here detailed.)

Judgment,  
18 Jan.  
1720-1.

After hearing counsel, *It is ordered and adjudged that the said petition and appeal be dismissed, and that the interlocutory sentence or decree therein complained of be affirmed.*

**Case 76. The Commissioners and Trustees of the**  
**Forfeited Estates, . . . . . Appellants;**  
**Sir George Stewart of Balcasky, Bart. Respondent.**

20 Jan. 1720-21.

*Fact — Forfeiture for Treason* — A crown vassal in 1707 sells and disposes his estate to an onerous purchaser, with procuratory of resignation, and other usual clauses, and the price is paid: the crown vassal in 1715 is attainted for treason, and the purchaser, who had not completed his title by infirmity, makes resignation, and takes saine on a charter from the crown: The estate was not forfeited by the attainder of the seller.

**B**Y an act of parliament 1 Geo. 1. c. 42. intituled "an act for the attainder of George Earl of Marischall and others," John Stewart of Invernytie was attainted of high treason. The appellants thereupon caused what they deemed to be his estate, particularly the lands of Gaskinhall, and others in the parish of Kilsindy and shire of Perth, to be seized and surveyed for the use of the publick.

John Stewart of Grantully in pursuance of the act 5 Geo. 1. c. 22. presented his exceptions to the Court of Session against the said seizure and survey, setting forth, that in May 1707, the said John Stewart of Invernytie by a mutual agreement entered into with John Stewart of Grantully, obliged himself to convey the said lands of Gaskinhall, and others to Grantully, and his heirs, subject to the jointure of Invernytie's mother; in consideration whereof John Stewart of Grantully obliged himself to pay at the rate of thirteen years' purchase of the rent payable in kind, and eleven years' purchase of the rent payable in money: and in pursuance of this agreement, John Stewart of Invernytie, with consent of Mary his wife, on the 11th of August 1709, executed a disposition of the premises in favour of John Stewart of Grantully, which was judicially ratified by the wife; and the purchase money, 30,000*l.* Scots, was paid to the disponent on the day of executing the disposition, and a receipt granted for the same:

That on the 30th of September 1712, Invernytie's mother, for an onerous consideration, conveyed her jointure issuing out of the premises to James Baird, Merchant in Edinburgh; and on the 7th of October 1712, Mr. Baird conveyed the same to John Stewart

Stewart of Grantully, who immediately after entered into possession of the premises and continued therein, and received the rents and profits, till his death : and that Grantully on the procuratory of resignation contained in the disposition by Invernytie, in his favour, after Invernytie's attainder, obtained a charter from the crown, the superior in February 1718, upon which he was duly infeft.

To these exceptions the appellants made answers that, as Invernytie alone was infeft, at the time of the attainder, the estate was thereby forfeited. The Court of Session on the 16th of September 1719, "found that on or before the 24th of June 1715, "the exceptant was in possession of the lands and others mentioned in the exceptions, by virtue of a disposition and deed of conveyance of the property thereof, made and executed before "the 1st day of August 1714, and that in virtue of the said "rights and possession, the exceptant has good right to the property of the said lands and others mentioned in the exceptions, "and to the rents, issues and profits, since the said 24th of June 1715, and in time coming."

The appeal was brought from an interlocutory sentence or decree of the Lords of Session, of the 16th of September 1719. Entered  
21 Dec.  
1719

John Stewart of Grantully, the original respondent, having died, the appeal was revived against Sir George Stewart, his heir, the now respondent.

#### *Heads of the Appellants' Argument.*

The Court of Session had no manner of jurisdiction in this case (a), since the attainted person was so far interested in the lands claimed by the respondent, that he was the only person who stood infeft in them as the vassal of the crown : a second deed of conveyance to any other person, with infeftment taken upon it, would have been preferable to the respondent's right, and would have vested the property in the second disponent.

The attainted person being the proprietor of the lands, the same became forfeited by his treason and attainder, without regard to any personal right or disposition upon which no infeftment had followed ; and there is no law in Scotland, to support such a personal right against the effect of a forfeiture. The law has no regard to covenants made between the attainted person and any third party, concerning such lands, if such third party have not completed his right before the treason or attainder : and if in any case a purchaser suffer, it is by his own neglect, since when he made a purchase, he ought to take care to complete his right in a legal way.

The respondent also insisted upon the act 1 Geo. c. 20. "for encouraging all superiors," &c., by which the rights of lawful creditors are saved ; and upon the act appointing commissioners

(a) See the case, Commissioners of Forfeitures v. Drammond, No. 6A of this Collection for an explanation of this argument. It is obvious, however, that the Court had jurisdiction in this case.

to inquire of the estates of certain traitors, by a clause in which, dispositions made even after the 24th of June 1715 are declared to be as good in law, as if they had been granted before that day, the valuable consideration being proved otherwise than by the narrative of the deed. But when he puts his case upon these acts, he must admit that the Court of Session had no jurisdiction, because these acts and clauses of them made use of by the respondent, do all concern claims that were to be tried before the appellants, to or upon lands, where the legal estate was vested in the forfeiting person. The act first mentioned hath relation only to creditors for payment of just debts, which is not at all the respondent's case. Although the other act does declare dispositions made after the 24th of June 1715, to be as good in law as if they had been executed before that time, it determines nothing as to the import or effect of dispositions without sale, which were executed before that day, but leaves them to the same effect they would have had, if this act had not been made; and therefore if before this law a disposition without infeftment could not be set up in bar of a forfeiture this act makes no alteration of the former law.

*Heads of the Respondent's Argument.*

It must at first sight appear inconsistent with every known principle of law and equity, that a purchaser for an onerous consideration, or in possession of an estate purchased for about ten or twelve years, and receiving the rents and profits during that time should forfeit that very estate by the attainder of the vendor so many years after the sale.

Though a subsequent disposition for a valuable consideration without notice, with infeftment recorded before that to the respondent, might be preferred to his, yet such preference can only be given to such purchaser, who first recorded his infeftment. But the grantor was nevertheless legally divested by the first conveyance; and the second conveyance, though good to the purchaser without notice, would be a wrongful act in the grantor, for which he might be punishable criminally, and any other estate he might have would be liable to make satisfaction to the first purchaser. As to the grantor, therefore, the deed, under which the respondent claims, divested him of the property, and the respondent might at any time, without any further conveyance or authority from the grantor have had infeftment, and has now actually obtained such infeftment, without any other right from the grantor; nor has the grantor made any subsequent conveyance to give occasion for any competition.

If the grantor were not wholly divested, yet by the act of parliament 1690, c. 33. "for security of creditors, vassals, and heirs of entail of persons forfeited," it is expressly enacted, that all estates forfeited shall be subject to all real actions and claims against the same; and by this act the respondent's case would be within the provisions of that act, since his is a real claim upon, rather of, an estate.

By



By a clause in the act "for appointing commissioners to inquire," &c. all conveyances made by the forfeiting person, even after the 24th of June 1715, are declared to be good, if the onerous consideration be proved; much more ought this which was made in 1707, and the price admitted by the appellants to have been paid. As this act has provided for every demand in equity as well as in law, though it should, for argument's sake, be admitted, that the property of the estate was not absolutely or finally vested in the respondent, yet certainly in equity he had the only title to it, and the grantor had no title in equity, nor could he forfeit any equitable interest, which was not in him, but in the respondent.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the interlocutory sentence or decree therein complained of be affirmed.* Judgment,  
20 Jan.  
1720-21.

For Appellants, *Ro. Dundas. John Willes.*  
For Respondent, *C. Talbot. Will. Hamilton,*

The Commissioners and Trustees of the  
Forfeited Estates, - - - *Appellants; Case 77.*  
Sir George Stewart of Balcasky, Bart. *Respondent.*

23d Jan. 1720-21.

*Fiar.—Forfeiture for Treason.*

**A**NOTHER question of the same nature as in the last appeal, arose between the same parties, in regard to the lands of Waterstown. The titles of the respondent to these lands stood in the same situation, as his titles to the lands of Gaskinhall. No cases have been found on the present appeal. That the questions were the same in this and the last appeal, appears from the report of the English Judges on the point of jurisdiction in the Court of Session, (Journal, 11 March 1719-20,) which they left undecided.

The judgment of the Court of Session, in favour of the respondent's predecessor, was pronounced on the 10th of September 1719.

The appeal was brought "from an interlocutory sentence or decree of the Lords of Session, of the 10th of September 1719." Entered,  
21 Dec.  
1719.

After hearing counsel, *It is ordered and adjudged that the said petition and appeal be dismissed, and that the interlocutory sentence or decree therein complained of be affirmed.* Judgment,  
23 Jan.  
1720-21.

Case 78. William Hamilton, of Grange, Esq; - Appellant;  
 Fountain- George Boswell Esq; - - - Respondent.  
 hall,  
 29 Dec.  
 1701.

Forbes,  
 25 July and  
 22 Nov.  
 1705.

3d Feb. 1720-21.

*Minority and Lesion.—Jus Mariti.—Courtsey.*—A minor wife, whose husband was major, is reposed on the head of Minority and Lesion, against certain deeds executed by her, with consent of her husband: but such consent of the major husband excluded his jus mariti and courtsey, though it did not extend to enforce a warranty of the deeds executed by the wife, to which he was specially bound.

AFTER the determination of the former appeal, (No. 44 of this Collection,) whereby it was found, that the infestments of the appellant's wife not being quarrelled in her lifetime, were sufficient to support the courtsey of the husband; the appellant brought a fresh appeal against sundry of the early interlocutors pronounced in the cause by him and his wife, in her life-time, against the respondent. On the 19th of December 1701, the Court "found that Margaret Boswell, the appellant's wife, being  
 " minor when she subscribed her contract of marriage and other  
 " writs craved to be reduced, she ought to be reposed against  
 " the same upon enorm lesion; and ordained parties procurators  
 " to be further heard if the said Margaret Boswell was enormously  
 " lesed by subscribing the writs aforesaid; but found that the  
 " appellant being major, and not having proved concussion, that  
 " the qualities alleged by him were not relevant to infer  
 " contravention to repose him against the deeds subscribed by him  
 " before and after the marriage, and therefore assilized the respon-  
 " dent from the reduction at the appellant's instance." And to this interlocutor the Court adhered on the 23d of February and 22d of June 1703: And on the 1st of July 1703, the Court  
 " repelled the nullity, that the father being curator to his daughter  
 " could not take a discharge to himself from his daughter, in  
 " her contract of marriage of her curator's accounts; but re-  
 " mitted to the Lord Ordinary to take inspection of the accounts  
 " produced, and instructions thereof, for inferring or liberating  
 " from enorm lesion, and to hear parties procurators there-  
 " upon."

Counsel being heard on the said accounts, and a report made to the Court, their lordships, on the 27th of the said month of July, "found sufficient instruction of enorm lesion to repose  
 " the appellant's wife against the contract of marriage, and  
 " deeds following thereupon, and to oblige the respondent to  
 " count and reckon:" to which the Court adhered on the 26th of November thereafter. After an account taken, the Court, on the 25th of July 1705, "found that the annual rents of the  
 " principal sums, and the rents of the acres and others belonging  
 " to the appellant's wife, must enter into compute for determin-  
 " ing

"ing whether she was enormously lesed by her contract of marriage; and found that she was enormously lesed; and that the respondent was not liable to account for the said annual rents and rents, in respect they were discharged by the appellant, the husband, who was major."

After further proceedings in the count and reckoning, and the respondent having got credit for the sum of 6000 merks, given as a marriage portion to his daughter, the Court, on the 16th of January 1708, "found that the respondent had in his hands, at the time of the marriage, of by-gone rents and annual rents, the sum of 509*l.* 10*s.* Scots, over and above all his disbursements, for aliment, expences of plea, and other expences, and annual rent thereof, expences of the wedding and wedding cloaths, public burdens, reparations, and others, depurged by him for his daughter preceding the marriage."

The appellant and his wife afterwards applied by petition to the Court, stating, that as it appeared, that instead of the daughter's being indebted to the father at the time of the marriage, as was pretended, he was in her debt 509*l.* 10*s.* Scots, so he had this sum as a reward to engage him to take her estate; and they therefore prayed, that they might be relieved against this transaction as being so much imposed upon: But the Court, on the 4th of July 1706, "affoizied the respondent from the reduction at the appellant's instance, in so far as concerned his *jus mariti* or courtesy, but declared the obligation or burden taken by the appellant to cause his wife to make good the disposition under a certain penalty, to be void as to the appellant's wife and her heirs, and reduced in so far." And on the 31st of the said month their lordships "reponed and restored the appellant's wife against the several deeds executed by her at the time of her marriage, and reduced the same as to her interest." And on the 22d of July 1707, the Court "refused to restore the appellant, or reduce the deeds as to him."

The appeal was brought from "part of two interlocutory sentences or decrees of the Lords of Session of the 19th of December 1701, and 25th July 1705, and the several affirmances thereof,"

Entered,  
26 Nov.  
1719.

#### *Heads of the Appellants' Argument.*

The said Margaret, the wife, was a minor, when she executed these deeds; she had at that time guardians or curators, and these deeds being executed without their consent, were void. They were not only deeds without their consent, but really deeds in their own favour, since they discharged the curators of all their receipts, upon the recital of an account stated, when there was no such thing. If these deeds were null upon this account, then the joint obligation of the appellant must fall; for a null obligation can have no accession, and the appellant's obligation was only accessory to the wife's.

It is certain there was very gross fraud, for the respondent, instead of letting his daughter know the true state of her affairs,  
wholly

wholly misrepresented them. Though the estate which descended to her from her mother was said to be encumbered, yet it appears it was quite otherwise; and though the respondent alleged that his daughter was in his debt, it was proved that he was indebted to her. And the time when these representations were used adds considerably to the fraud; after he had proposed the appellant as a proper husband for her, after their affections were mutually engaged, then, and not till then, did he trump up the false account of her circumstances. To tell them then that there should be no marriage without giving in to the terms proposed by him, shews, to a demonstration, the intention of a fraud. That is even still made more plain from the inducement he made use of to persuade the appellant and his daughter to agree to these measures, which was the promise of a fortune of 6000 merks, which, as he said, was altogether voluntary, when in fact the 6000 merks were her own money, and instead of giving her any thing, he retained the interest of 2000 merks of her own money during life.

If the transaction in regard to the wife was fraudulent, as the Lords have determined it to be, it must be so in relation to the husband, he being imposed upon and drawn in by the same misrepresentations; and the reason given for the distinction, viz. that the husband was major, seems to be of the most dangerous consequence: Upon that way of reasoning, no man of full age is to be relieved against fraud. A minor is to be relieved on account of nonage, even though the bargain be not fraudulent; but wherever fraud is an ingredient, whoever is thus fraudulently circumvented, without regard to his age, is to be relieved. This is the proper business of a Court of Equity, as the Court of Session certainly is.

If the appellant was not to be relieved because of age, how could he be relieved against his obligation, that his wife should ratify these deeds when of age, under a penalty equal to the value of the estate? Was not he as much of age, when this obligation was entered into, as when the conveyance was executed? And as they were in the same deed, why should he be relieved against one and not against the other, since the reason is the same in both.

#### *Heads of the Respondent's Argument.*

The respondent claimed the appellant's life-rent estate upon the same title and conveyance which is now quarrelled; and the Court of Session absolved him from the appellant's action brought in order to remove him from the possession of that life-rent estate; which was directly and plainly decreeing the estate to belong to the respondent in virtue of this conveyance. That decree was affirmed by the House of Lords; and if the appellant did not think fit to insist upon the objection he now makes against the conveyance, he has himself to blame; but the truth is, he was conscious to himself, and was advised, that the objection was of no force.

There

There is no evidence of the least unfair dealing in the whole transaction; the respondent represented the circumstances of the estate according to the best of his knowledge and belief: if the appellant was not satisfied with these accounts, he was at freedom to have inquired more narrowly, which if he neglected, he has himself to blame, but that can be no ground for avoiding the transaction.

It was optional to the respondent to consent to his daughter's marriage with the appellant or not, as he thought fit, and upon such terms as he judged reasonable, considering his own circumstances; and if it was true that the appellant would not consent to the marriage, and give the tocher with his daughter, that he actually gave her, without the appellant's quitting and making over any claim he might have had to the life-rent of the daughter's estate, there was no fraud in this, but a fair transaction. The appellant himself, in a petition given in to the Court in the name of his wife, does acknowledge in so many words, that he neither did allege nor prove any concussion or force used against him, though he had alleged and proved concussion used against his wife.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that such part of the interlocutory sentences or decrees, and the affirmances thereof as are therein complained of, be affirmed.* Judgment, 3 Feb. 1720-21.

For Appellants, *Rob. Raymond. Will. Hamilton.*

For Respondent, *Ro. Dundas, Tho. Bootle.*

The actions between these parties appear to have lasted upwards of 20 years.

John Paterfon, eldest Son and Executor of  
John Archbishop of Glasgow, deceased, *Appellant*;  
The Commissioners and Trustees of the  
Forfeited Estates, *Respondents.*

Case 79:

20th March 1720-1.

*Forfeiture for Treason.*—1 Geo. 1. c. 20.—*Personal debt claimed on a forfeited Estate.*—The acts relative to forfeiture for treason having saved the rights of creditors innocent, dutiful, and loyal; a claim on a forfeited estate, by virtue of a personal bond, (which had been given up in the inventory by the claimant when confirmed to his father) is made by a person who had been confined in prison upon suspicion, but liberated without trial; this claim is rejected by the trustees and Court of Delegates, but their judgment is reversed.

IN February 1681 Charles Earl of Marr, deceased, as a principal, and George Earl of Panmure deceased, as cautioner, granted a bond to the appellant's father for 2000 marks Scots.

In

In September 1700, James late Earl of Panmure, attainted, executed a bond of corroboration of the former, obliging himself to pay the sum therein contained to the appellant's father, with interest from that date.

After the archbishop's death, the appellant was confirmed his executor, and exhibited an inventory of all his effects, wherein, inter alia, was mentioned the bonds in question, their dates, and the interest then in arrear; and this inventory was recorded in the commissary court-books, where the testament was confirmed.

John late Earl of Marr, son and heir to the said Earl Charles, and the said James late Earl of Panmure being by act of parliament attainted of high treason, the appellant, in pursuance of the act 1 G. 1. c. 50. intituled, "*An act for appointing commissioners to inquire,*" &c. and of the act 4 G. 1. c. 8. intituled, "*An act for vesting the forfeited estates in trustees to be sold for the use of the publick,*" entered his claim before the respondents upon the said bonds, to obtain satisfaction of the said sum of 2000 merks, with the interest thereon then in arrear, out of the estates of the said attainted earls of Marr and Panmure.

After hearing counsel for the appellant, and consideration of memorials in writing given in on both sides, the respondents, on the 31st of August 1719, pronounced judgment, by which they found, "that the foundation of the claim being a personal bond, not upon record before the attainder of the debtor attainted, the claimant has no right to the principal sum and interest claimed, either by the laws of Scotland before the Union of Great Britain or since, unless he had continued in peaceable and dutiful allegiance to his majesty during the late unnatural rebellion: and therefore that the claimant, before his claim can be affirmed, ought to produce testimonials either from justices of the peace, or deputy lieutenants of the county where he resided, or from other persons of credit in his neighbourhood, bearing that to the best of their knowledge and information the claimant had continued dutiful and loyal to his majesty during the said rebellion. And the claimant having insisted by his counsel that he ought to be presumed innocent, and the commissioners and trustees having further considered of the said memorial relative thereto, are also of opinion, *primo*, that the bond, on which the claim is founded, not having been recorded before the treason and attainder of the debtor, it is not saved even by the act of parliament 1690; and that it cannot be binding against the public, (notwithstanding of its having been confirmed in a testament prior to the said attainder,) in respect that such confirmation, being only to establish a title of succession, could give it no force, nor be the foundation of any diligence or execution against the debtor, without the said bond's being entered in the proper record, and its being otherwise valid in law. *Secundo*, That whatever was the extent of the said act 1690, as to saving of personal debts from being extinguished by the attainder of debtors, yet that the said actions from whence a want of duty and loyalty might be inferred, cannot

“ cannot be presumed, but must be proved by a regular and legal trial; are of opinion that a presumptive evidence of duty and loyalty, founded on testimonials, such as are above mentioned, may easily be obtained without any trouble or proof of particular actions by all who, according to the most favourable opinion, or the most extensive charity, are to be reckoned to have continued dutiful and loyal: and that the criminal actions, because the weight of the punishment which attends the proof of them, as to criminal and penal effects, require a very strict and regular proof by a jury of peers before they can have any penal effect; yet as to a civil effect they may and ought to be presumed, where testimonials (so easily obtained by the really innocent) cannot be obtained; especially in a case where there is so great notoriety, as is in that of the claimant, it consisting with the knowledge of many thousands that the claimant was taken prisoner at Preston with the others then in rebellion, and was carried to London, where he lay in prison till by the clemency of the government he was delivered from the punishment of rebellion and treason. Upon all which the said commissioners and trustees do find, that the claimant is not entitled to the benefit of the act for encouraging all superiors, vassals, &c. and do therefore disallow of the said claim; and the same is by this Court dismissed accordingly.”

Against this decree of the respondents the appellant presented his appeal to the Court of Delegates (a) established in Scotland; the Lord Advocate made answers to it; and after a hearing of the cause, and considering memorials for both parties, the Court of Delegates, on the 20th of December 1720, by a majority of one, “ ordered and adjudged, that the decree complained of be affirmed, and the said appeal dismissed.”

The appeal was brought from “ a decree of dismissal of the 31st of August 1719, made by the commissioners and trustees of the forfeited estates, of the appellant’s claim, put in before them, and an affirmance thereof by the Lords Delegates in Scotland the 20th of December 1720.”

Entered  
19 Jan.  
1720-1.

*Heads of the Appellant’s Argument.*

As every man ought to suffer for his own fault, so it is the highest justice, that no creditor should suffer by the rebellion of his debtor, nor any thing be forfeited to the Crown but what the forfeiting person had *deductis debitis*; and therefore the appellant’s claim being for a debt admitted to be just, it ought to have been sustained, and the same decreed to be paid out of the estate of the debtors, which are admitted to be much more than sufficient to satisfy the debts upon the same.

This rule seems more agreeable to the law of Scotland, by which all estates descending to an heir are subject to the payment of all

(a) This Court of Delegates was appointed by the act of parliament 4 G. 1. c. 8 to hear appeals taken to judgments of the commissioners for forfeitures. They consisted of five of the Judges in Scotland appointed by his majesty.

debts.

debts, even those by simple contract; and there seems to be the same reason, that the estates should be equally subjected to debts in the hands of the Crown.

1690, c. 33.

It is expressly enacted, by the act 1690, c. 33. that forfeited estates shall be subject to all debts whether real or personal. The words are, "*That all estates forfeited shall be subject to all real actions and claims against the same to all true and lawful creditors, whether personal or real.*" This certainly comprehends the appellant's case. It is true, in one part of the act are these words, "*so as the debts be upon record, or diligence done thereupon;*" but as that exception or proviso is not in that part of the act where the forfeited estates are subjected to all debts in general, and where its proper place was, if any such restriction had been intended, so the words insisted on are inserted in a place where no mention is made of debts, but leases to tenants, and before any thing is mentioned with respect to creditors, and the judges have always so construed this act, and never thought recording necessary.

But if recording were necessary, that part of the law is sufficiently answered by the claims being upon record in the Commissary Court, and the intention of the law was sufficiently attained; because it can have no other view than to avoid fraudulent demands. Now the record of this debt does as sufficiently answer that, as if the bond had been registered.

The act of the first of the king, *for encouraging all superiors, vassals, &c.* enacts, "That no conviction or attainder shall exclude the right or diligence of any creditor remaining peaceable and dutiful for security or payment of any true, just, and lawful debt contracted before the commission of the crime." The appellant's debt is entirely within this description, and so far appears to be a true debt, that it is contracted, not between the forfeiting persons and the appellant, but between the fathers of the forfeiting persons and the appellant's father; it is not disputed but the debt is still owing, and no part of it paid.

Nor will it alter the case, that the respondents pretend, that the appellant does not come under the description of this act, in regard he was not peaceable and dutiful, because nothing of that is proved, nor any attempt made to prove it: a crime is never to be presumed; but innocence is, till the contrary be proved.

The case of the appellant and other creditors is still more supported from the distinction made by the legislature itself between the cases of superiors and creditors; in the first, they have in very distinct lines set forth the description and character of such as were to have the benefit of the privileges introduced in favour of superiors, vassals, and tenants, in these words: "*provided always, that none of his majesty's subjects, whether superior, or vassal, or tenant, shall have the benefit of this act, excepting such who being lawfully called out or required to join with his majesty's host, in opposition to the said Pretender or his adherents, shall do the same, or who (not being so called out or required) shall continue peaceable and dutiful to his majesty.*" Thus the law

having



having introduced a reward, and (which was purely such in favour of superiors) very reasonably excluded such as did not fall within the particular description; but they have made no such particular provision in the case of creditors, where they were doing justice rather than a favour. Nor can it be expected, that the appellant should bring any proof of his not having acted undutifully or unpeaceably, nor is it possible for him to prove it, unless he could bring evidence of every action of his life, during the whole course of the late unnatural rebellion.

It has still been looked upon as a hardship to inflict the least censure or suspicion on bare suggestion; but harder must be the fate of the appellant to be involved in the forfeiture of his debtors, and be deprived of his just debt, for no other reason but because he did not adduce a proof that every moment of the rebellion he was in the practice of such duties as are incumbent upon a dutiful subject, which is not only impossible, but has hitherto been thought unnecessary, since innocence and dutiful behaviour are always presumed. If this doctrine be established, that every subject must be presumed to be disaffected, if he cannot by undoubted vouchers shew the contrary, it is too obvious how fatal the consequence may be.

#### *Heads of the Respondents' Argument.*

According to the plain words of the proviso in the act 1690, no debt can be set up against the forfeiture, or charged upon the estate forfeited, but such as is *recorded by being registrate, or diligence done upon it*, that is, suit or process carried on against the debtor or his estate; neither of which was done in the appellant's case. And the mentioning the debt in a list of the defunct's debts at the time of confirming his testament is no registration of the debt, since the obligations themselves were not so much as produced in those cases; indeed, the executor commonly is not master of them, he gives up in the list whatever he suspects may be owing, sometimes debts that never were in being, and frequently debts that are extinguished or satisfied by payment.

If the appellant could have any benefit from this act, it would only save his claim as to the capital sum, but not as to bygone interests, feu-duties, and all other annual prestations, which are expressly excepted in the act, and declared not to affect the estates forfeited.

This act, 1690, being made only in favour of *creditors innocent and dutiful*, the appellant can have no benefit by it, who *himself* was in the rebellion.

But this act is not now the rule for judging in questions of this kind, after the act 7 Ann. c. 21., intituled, "An Act for improving the Union of the two Kingdoms;" by which the laws of England in relation to treason, in so far as may concern the nature of the crime, the form of trial, and the punishment, are extended to Scotland; and persons committing treason in Scotland are declared subject to the same pains, penalties, and forfeitures, that persons

persons committing treason in England are subject to. From whence it must follow, that as estates in England are forfeited to the Crown, without being charged with debts merely personal, estates in Scotland must be forfeited in the same manner.

1 Geo. 2.  
c. 20.

The act 1 Geo. c. 20., *for encouraging all superiors, vassals, &c.*, seems likewise to make a material alteration in the said act 1690, (if that act 1690 can be understood as the appellant explains it); for this act 1 G. c. 20. provides only for the security of creditors remaining *peaceable and dutiful*, which supposes that a creditor not remaining peaceable and dutiful can have no claim of debt out of a forfeited estate.

The appellant contended, that he must be presumed to be innocent, and that the lapse of three years, and the act of grace did bar all probation of guilt. But since the appellant claims the benefit of acts of parliament introducing privileges to persons peaceable and dutiful, contrary to the strict nature of forfeitures, and beyond what was competent by anterior laws, he must bring himself under the description and intent of those acts, by giving some evidence of his remaining peaceable and dutiful. The lapse of three years, and the act of grace free him only from the punishment of his own treason; they do not put him in the condition of a man who was never criminal; nor can they be construed so as to afford him any privilege, thereby to hurt the public, and lessen the effects of the forfeiture of the late Earls of Marr and Panmuire.

The appellant entered his claim, and was by law obliged to do it, both before the act of grace and the lapse of the three years; but he was at that time incapable of entering any such claim, not having remained peaceable and dutiful; and if the claim was bad at the time of entering it, and at the time these forfeited estates were vested in the respondents for the use of the public, it is to be considered as if no claim had been entered at all: and no after-act of grace or lapse of three years can give life to a claim which was dead and useless at the time it was entered, and the estates so vested in the respondents.

Judgment,  
30 March  
1720-1.

After hearing counsel, *It is ordered and adjudged, that the decree of dismissal complained of in the said appeal be reversed; and it is further ordered, that the appellant shall have a satisfaction for the principal sum and interest due upon the bonds in question out of the forfeited estates in question.*

For Appellant, C. Talbot. Will. Hamilton.  
For Respondents, Ro. Dundas. Richard West.

On the printed Cases, from which this report was taken, it is stated in manuscript that a division of the House took place upon this judgment, the numbers being 21 to 11.

Simon Lord Lovat, - - - *Appellant,* Case 80.

Emilia Lady Dowager of Lovat, Alexander Mackenzie of Garloch, an Infant, by his Guardians, and others (stiling themselves) real Creditors upon the Estate of Lovat, and Hugh Mackenzie and Patrick Robertson, Factors appointed upon the said Estate, - - - *Respondents.*

1st April 1721.

*Real and Personal.*—A disposition is made of an estate to one person in life-rent, and to others in fee, with the burden of payment of the grantor's debts: in a competition between the grantee of the life-rent escheat of the life-renter, and the debtors of the grantor of the disposition, the Court found that these debts were real, and did affect the estate; but their judgment is reversed.

A grantor of a deed declares, that if children's portions are not paid in his lifetime, persons whom he names may appoint a factor, after his death, to receive certain rents, and pay these portions: these portions were real debts affecting the estate.

*Sequestration.*—Obtained irregularly is set aside.

*Presumption.*—Marriage provisions presumed to be compensated by the grantor of and accepting a posterior provision.

Children's provisions not claimed till after a forfeiture, and the lapse of several years after a locality might have been made effectual to pay them, were not presumed to be paid; an affirmation.

**BY** the decision in the former appeal, (No. 53. of this Collection) the appellant was confirmed in his right as grantee of the life-rent escheat of Alexander Mackenzie of Fraserdale, the attainted person; and it was ordered and adjudged, “that the rents of the estate in question should be paid to the appellant according to his grant; but that such debts of the said Alexander Mackenzie as were real, and did by the law of Scotland affect the said estate, at the time of the forfeiture of the life-rent escheat should be charged on the said estate in due course of law.” It now became a question between the appellant and respondents whether certain debts claimed by them were real or not, or whether they did affect the said estate. These questions took their rise from the following circumstances.

By contract of marriage in 1690, between Hugh Lord Lovat deceased, and the respondent Lady Emilia, daughter of the late Marquis of Athol, the said Hugh Lord Lovat, in consideration of the then intended marriage, obliged himself to settle upon Lady Emilia as a jointure, several lands therein particularly mentioned, of the value of 4000 merks Scots *per annum*, and likewise an annuity of 2000 merks *per annum*, charged upon the lordship of Lovat, and lands of Stratherrick and Abertarf; and accordingly, pursuant thereto, a charter was obtained from the crown, and Lady Emilia was inest in the premises in May 1694.

In September 1696, Hugh Lord Lovat executed a bond of provision to his daughters the Honourable Ann, Catherine, and Margaret Frazer, three of the present respondents, for 10,000 merks Scots, payable to each of them at their age of 16 or marriage; and this bond was registered in October 1700.

The estate of Lovat being very much incumbered and adjudications led thereon prior to said marriage-settlement, the greatest part of these adjudications were purchased in by Roderick Mackenzie of Prestonhall, one of the Senators of the College of Justice, whose son Alexander Mackenzie, the attainted person, married Emilia, some time styled Baroness of Lovat, eldest daughter of the said Hugh Lord Lovat. In 1706, Lord Prestonhall, obtained a charter of adjudication from the crown of the estate of Lovat, upon which he was duly infest; and he afterwards executed a deed granting to the said Alexander Mackenzie and his wife 4000 merks per annum charged upon the said estate; and he also executed an entail thereof, to Alexander Mackenzie in life-rent, whom failing to Hugh styled master of Lovat his son, and the heirs male of his body, whom failing to certain other heirs therein mentioned. This deed of entail when reciting the particular lands out of which the respondent, the Dowager Lady Emilia's jointure of 4000 merks was secured, expressly mentioned that the same should continue a burden upon these lands; but it took no notice of the annuity of 2000 merks before mentioned, which had been also provided to her by her marriage contract, and charter and sasine thereon. The deed likewise provided "that the said Alexander Mackenzie, his life-rent, over and above the said 4000 merks provided to him and his lady in life-rent, and the other heirs their fee should be affected and stand burdened with the payment of all the lawful debts, and to the performance of all the deeds that the said Roderick Mackenzie should happen to be bound in, or obliged to perform at the time of his decease by bond, or any other manner of way whatsoever: and that in case the daughters of the said Hugh Lord Lovat deceased, were not satisfied and paid their portions in the life-time of the said Roderick Mackenzie, that it should be in the power of the persons therein named to appoint a factor or receiver of the rents of the lands of Stratherrick and Abertarf within one year after the grantor's death, and to apply the rents of the said lands to the payment of their fortunes." In terms of this entail a charter was obtained from the crown, upon which infestment was duly taken. Lord Prestonhall died in 1708.

In February 1717 the father of the respondent Alexander Mackenzie the infant, to whom Lord Prestonhall was indebted by bond, obtained a decree of declarator and adjudication (after the dates of the forfeiture and gift of life-rent escheat,) declaring the life-rent of Alexander Mackenzie the forfeiting person, and the fee of Hugh (styled) Master of Lovat, and the lands themselves subject to the payment of what was due on said bond, amounting to 6132*l.* Scots.

The

The respondent Lady Emilia, and other creditors likewise brought their several actions before the Court of Session, to have their demands ascertained, and to have the rents of the said estate applied in satisfaction of their debts, as real charges on the estate. The persons, too, authorized by the deed of entail 1706, to appoint a factor upon the lands of Stratherrick and Abertarf for payment of the said young ladies' fortunes, named a factor accordingly; and the said ladies and their factor likewise brought their action to be preferred to the rents of these lands. And the respondent the infant, brought an action of mails and duties in virtue of the said adjudication. To these actions the appellant made defences, and insisted, that the clause in the entail did not make the debts of Lord Prestonhall, real charges upon the estate; that, as to the respondent, the dowager's, claim of 2000 merks, it was included in her jointure of 4000 merks specified in the entail, at least so it was to be presumed, since in that deed notice is only taken of the 4000 merks; that it was to be presumed that the fortunes of the respondents, the daughters, were paid, but if they were not, they could not be looked upon as a real charge, there being nothing in the deed declaring them to affect the lands themselves, but only a locality granted for payment of the portions, and that the respondent, Alexander Mackenzie's debt, being very old, was presumed to be paid.

The Lord Ordinary on the 25th of January 1718, "found  
 " that the said Lord Prestonhall, having conveyed his estate  
 " to Mr. Mackenzie, the forfeiting person, with the bur-  
 " den of his debts, and the said burden being repeated both  
 " in the procuratory of resignation, and precept of sale, and also  
 " repeated in the infestment following thereupon, the said Lord  
 " Prestonhall's debts are real, and preferable to the debts and  
 " deeds of Mr. Mackenzie; and that the respondent, Alexander  
 " Mackenzie, was creditor to Lord Prestonhall, by virtue of the  
 " instructions in process before the date of the entail, and there-  
 " fore preferred him to the appellant the grantee, his tutor de-  
 " posing upon the verity of the debt: and likewise preferred  
 " the factor appointed for the lands of Stratherrick and Aber-  
 " tarf, according to the said deed of settlement, until the respon-  
 " dents, the daughters, should be paid and satisfied their said for-  
 " tunes and interest thereof according to the said entail; and  
 " likewise found the respondent, the lady dowager, was provided  
 " with an annuity of 2000 merks per annum, out of the lordship  
 " of Lovat and other lands, and therefore preferred her likewise  
 " for her said annuity."

And after a representation and answers, the Lord Ordinary, on the 15th of February 1718, "adhered to his former interlocutor,  
 " finding these debts real burdens, preferable to Mr. Mackenzie,  
 " the forfeiting person, and so that they must exclude the grantee  
 " of his escheat; and found it relevant, if it be insisted upon,  
 " that the portions of the late Lord Lovat's children are satisfied in  
 " bail or in part; as also that the lady dowager's last provision is  
 " in satisfaction of her former by her contract of marriage; but

“ repelled the allegation, that either the portions are to be presumed to be paid, or that the lady must be presumed to have accepted the second provision in full satisfaction of the former, as no ways relevant presumptions, without some further probation.”

The appellant reclaimed against these interlocutors to the whole Court, and their Lordships by several interlocutors, on the 28th of February 1718, the 23d of June, the 3d and 14th of July, and 24th of December 1719, confirmed the foresaid interlocutors of the Lord Ordinary.

Previous to the former appeal, the creditors of the forfeiting person, who were then litigating with the appellant, arrested the rents of the estate in the hands of the tenants; and in the multiple poinding subsequent thereto, the rents were found subject to the debts and diligences of these creditors, preferable to the appellant, and a factor was appointed to receive the same. After the order on the said appeal had been served, the appellant presented a bill of suspension in the name of the tenants, upon the ground of his appeal, and all execution was accordingly stayed thereon. Pending the action with the present respondents, they, in June 1719, presented a petition to the Court praying leave to discuss the reasons of suspension of the said bill, (which had been given in against the then factor in another cause); and that in the mean time the said estate might be sequestrated, and a new factor appointed to receive the rents.

On the 27th of June 1719, the Court “ remitted to the Lord Ordinary, before whom the aforesaid bill of suspension was presented, to discuss the reasons summarily on the bill, but ordered the appellant to answer the said petition as to the sequestration against Tuesday then next.” But no answer having been given in, the Court, on the 30th of June 1719, “ remitted to the Lord Ordinary to sequestrate the estate, and to name a factor to receive the rents.” On the 18th of July thereafter, the Lord Ordinary sequestrated the estate, and named Mr. William Fraser, factor thereon.

The appellant reclaimed against these interlocutors, praying that they might be set aside, and the sequestration recalled, and amongst other things insisted, that the said Alexander Mackenzie, the forfeiting person, had a right to 4000 merks per annum, out of the rents of the estate preferable to all debts, and therefore that these rents should not be sequestrated. The respondents made answers, and the Court, on the 31st of July 1719, pronounced this interlocutor “ in regard there was no instruction that the 4000 merks of life-rent reserved free of the burden of debts was allocated on any part of the said estate, and as there are no instructions of the objections against the factor named, adhere to the said Lord Ordinary’s interlocutor, both as to the sequestration and nomination of the factor, reserving to the appellant to be heard on his right to the said 4000 merks, when he shall insist therefore.”

William

William Frazer, however, not finding security, upon application of the respondents, Mr. Hugh Frazer and Patrick Robertson were on the 10th of November 1719, named factors of all the estate of Lovat, except the lands of Stratherrick and Abertarf, (upon which a factor was appointed by the persons named in the deed of 1706, for security and payment of the young ladies' fortunes,) who gave security to be answerable as the Court should direct.

The appeal was brought from "several interlocutory sentences or decrees of the Lords of Session of the 25th January, the 15th and 28th February 1718, the 23d of June, the 3d and 14th July, and 24th December 1719; and from the interlocutors and other proceedings in relation to the sequestration of the estate of Alexander Mackenzie, late of Fraserdale, and appointing a factor to receive the rents thereof." Entered,  
13 Jan.  
1719-20.

*On the Sequestration and appointing a Factor on the Estate.—Heads of the Appellant's Argument.*

The proceedings therein are wholly irregular, as not being had in any action brought by any of the respondents against the appellant, but only grafted upon his bill of suspension in another cause, at the instance of other creditors, whose debts were merely personal, to which the respondents, or any of them, were in no ways parties, or so much as named therein, and which action was determined by the judgment in the former appeal.

By that judgment, the rents and profits of the estate are ordered to be paid to the appellant; but it would be absolutely ineffectual to him, if at the suit of any pretended creditor, the Lords of Session may, on a summary application, sequester the estate and appoint a factor to receive the rents. And though by the said judgment such debts as are real, and did by the law of Scotland affect the estate at the time of the forfeiture, are allowed to be charged thereon in due course of law, yet the appellant apprehended that such debts were to be paid by him out of such rents and profits as should be received by him, and until he should make default therein, it would be unreasonable to bring the charge of a factor on the estate, which must consequently fall upon the appellant. And further the respondents' debts cannot be said to be real in the sense of the former judgment; for it will not be pretended, that they could have produced any real action to exclude the appellant's gift of escheat; and however they may be considered in some sense to be real, so as to make them preferable to the debts and deeds of the grantor's heir, yet it will not thence follow that they are real with respect to the forfeiture; since at that time they could no more have produced a real action, than the mere personal debt whatever.

*Heads of the Respondents' Argument thereon.*

There was no actual suspension of the action at the instance of the creditors, but only the reasons of suspension ordered to be heard. As creditors upon an estate which is much encumbered, have a right to apply to have it sequestrated, and a receiver or

factor appointed; so, no doubt, the respondents were in the same case with other creditors; and it is certainly more just and equitable, that the rents of an estate, which are applicable to the satisfaction of creditors, should be under the management of a receiver who is appointed by the Court, and obliged to give security to pay as the Court should direct, than of any other person. There no injustice can possibly happen; every person will be paid according to his rights, and there will be no fear, that one only receiving the rents may render the payment of the others precarious; and it were contrary to equity that the appellant, whose advantage it is not to pay the creditors, should be allowed to levy the rents of an estate to which they are preferable.

It was the appellant's own fault that he did not insist in the reasons of suspension; he had notice, and might have done it, and no doubt had there been any thing of moment to be objected, he would have appeared by his counsel. Since he did not, it seems improper for him to complain at this time.

As the judgment on the former appeal directs the payment of the rents to the appellant according to his grant, so it directs, *that the real debts of the said estate be charged thereupon in due course, according to the law of Scotland.* This judgment gives no new right to the appellant, but leaves him as grantee, and the real creditors upon the foot of the law of Scotland in the like cases; and it cannot be pretended but that creditors upon an estate are by that law entitled to a sequestration of the estate for the just payment of their debts, and consequently the judges have only pursued their usual rules and methods in such like cases. And since there may be interfering interests among the creditors themselves, as it is plain there are interfering interests between the grantee and the creditors, nothing can be more just, nor more agreeable, both to the intention and words of the decree of the House of Lords, than that the rents should be secured in due course of law for the benefit of all concerned, that is, by a sequestration.

*On the interlocutors finding the claims of the respondents to be real charges on the estate.—Heads of the Appellant's Argument.*

As to the lady dowager's claim of 2000 merks annuity more than the 4000 merks provided to her by the said Roderick Mackenzie's settlement, which she has all along enjoyed, and never had or claimed more till since the forfeiture; it is to be supposed that the said 4000 merks so secured to her were agreed by her to be taken in full of all she could demand by her contract of marriage. From this it is apparent that she was excluded by the prior incumbrances which had been purchased by the said Roderick Mackenzie, whereby he got an absolute right to the said estate: and more especially since in the charter which he thereby obtained from the crown, there is no exception of her right by the marriage contract, nor is there any proof that she ever claimed or received more than she now enjoys.



As to the ladies' portions it is to be believed that they were paid by the said Roderick Mackenzie before his death, when they had become due, being payable at their respective ages of sixteen, or marriages; and more especially since two of them have been married about sixteen years. If they had not been so paid, the lands of Stratherrick and Abertarf must, according to his settlement, have been sequestrated, and a factor appointed to receive the rents thereof the next year after his death, which happened in 1708, whereby they would soon have been paid; and yet no factor was appointed till after the grant of the life-rent escheat to the appellant.

As to the respondent Mackenzie's pretended debt, it may reasonably be believed, that the same was paid by the said Roderick Mackenzie in his lifetime, since no action had been brought, or the bonds so much as registered, in so many years till after the forfeiture. But, further, this general clause in the settlement, wherein this pretended debt is not mentioned, could not make it a real charge on the estate at the time of the forfeiture, the respondent not being thereby entitled to bring any real action against the said estate. And if clauses of this nature should have such a construction, no purchaser of land in Scotland could be safe; and the appellant's case is much stronger than that of a purchaser. Besides, the respondent's decree of adjudication is null and void, as to the appellant, who was in possession of the said estate by virtue of his grant, before the same was obtained, and yet he was never made a party to the action.

The Court of Session put it on the appellant to prove, that the claims of the respondents were satisfied, which it was impossible for him to do, the discharges or agreements relating thereto being all in the custody or power of the forfeiting person, for whose interest these and other claims are collusively set up to cover the estate against the appellant. On the other hand, if these claims be just, the lady dowager might have proved, that the 2000 merks annuity, more than the 4000 merks which she has all along enjoyed, had been paid to her, at any time since the provision made for her by the said settlement; and her daughters might have proved the payment of interest for their respective portions, within some reasonable time before the forfeiture; and the respondent Mackenzie might have proved payment of interest, or given some other satisfactory proof of the justice of his debts, none of which have been done.

But if any debts shall, after a due examination, be found just and real, so as to affect the estate, the appellant is willing to pay the same in their due course, on their being assigned to him; and it would be very unreasonable if such creditors should not be obliged to assign their respective debts, on payment thereof, but that they shall be still kept up on the estate to exhaust the whole rents during the attainted person's life: and more especially since his lady has 300*l.* sterling *per annum* allowed to her by the government out of all the rest of the forfeited estates in Scotland: so

that if by these artifices they can cover the estate, *the family, instead of being losers, will be gainers by the treason.*

*Heads of the Respondents' Argument thereon.*

The lady dowager does not possess either her jointure or annuity by virtue of Lord Prestonhall's deed of settlement, but by virtue of her marriage articles, and a charter from the crown, and saline thereon; and by these she is entitled to 4000 merks out of certain lands, and an annuity of 2000 merks out of the whole estate, and no expression in Lord Prestonhall's deed can be any bar to her right, since she does not claim under it. Besides, the appellant mistakes the deed of settlement, for it contains no restriction of the respondent's right. All that is said there is, that when enumerating the particular lands out of which the said 4000 merks were issuing, and making a settlement of them, Lord Prestonhall does it with a reservation of the respondents' right out of these lands, but does by no means restrain her claim to that sum only.

The portions to the daughters were not paid; and if the appellant thinks he has any reason to insist upon that, he is at liberty to do so: but he cannot expect, as he pleaded below, that the respondents should prove that they are not paid: that were to take the burden of proving a negative; and indeed, the appellant never pretended that they were paid, but only insisted that it was to be presumed they were. Though the persons entitled to name a factor upon the lands might for some time neglect to do it, because the daughters might depend upon Mr. Mackenzie's paying them, that was no argument why they, when the estate went into other hands, might not apply to have a factor named for their better security; and as the deed of settlement under which Mr. Mackenzie, and consequently the appellant, as grantee of his escheat, claims, is expressly burdened with that power, and the persons entitled to execute it have done so, it is difficult to know why the appellant should complain. The assignment to the rents of the lands in question, and the power to name the factor being an express burden, affecting both the dispositive clause and procuratory of resignation contained in the deed of settlement, it gives the children a real right and immediate access to the rents, preferable to any person claiming under that settlement, as the appellant does.

It is denied that the respondent Mackenzie's debt was paid; the respondent's tutor was, at the appellant's desire, directed to make oath of the truth of the debt, which he offered to do, but the appellant did not insist upon it; and he is, by the very interlocutors complained of, allowed to insist upon any defence of payment.

The debts of the grantor were certainly real by the express words of the clause in the deed of settlement, for *the life-rent of Alexander Mackenzie, and the fee of the master of Lovat*, are declared subject to the payment of all the grantor's debts; and this is the method by the law and constant practice of Scotland,

land, of burdening conveyances of lands with debts owing to third parties, so as to make such debts real; and this will certainly give a preference to the creditors of the grantor before the creditors, either of the persons in life rent or in fee. It is true the creditors have no access to the rents without an adjudication, that being the legal method of obtaining possession; yet the debts are burdens upon the infestments of property, and as soon as an adjudication is led thereupon, the adjudger has immediate access, and will be preferred, not according to the date of the adjudication, but of the infestment burdened, to all infestments or real rights granted after that infestment of property, though before the date of the adjudication; which is a demonstrative proof that the debts are real from the date of the infestment burdened.

After hearing counsel, *It is ordered and adjudged, that the several interlocutors of the Lords of Session complained of, by which the estate in question is sequestered, be reversed, without prejudice to any future sequestration that may, upon just cause, be granted in a proper and regular method against the said estate, for any such debt as is chargeable thereupon, agreeably to the decree made in this House in the former appeal; and that so much of the interlocutors complained of, as decree the annuity of 2000 merks to the Lady Dowager Lovat, and the debts claimed by and on the behalf of Alexander Mackenzie of Garlock, the infant, and other real creditors upon the said estate, be reversed; and that such of the interlocutors as prefer the factor appointed for the lands of Stratherrick and Abertarf, in pursuance of the Lord Prestonhall's deed, for the portions of the respondents, Anne, Catharine, and Margaret Fraser, until the said respondents should be paid their respective portions of 10,000 merks each, with interest, be affirmed, without prejudice to the appellant, to object upon payment, or any other ground of law against the said debts as accords.*

Judgment,  
1 April  
1721.

For Appellant,	Rob. Raymond.	Sam. Mead.
For Respondents,	Ro. Dundas.	Wil. Hamilton.

The sequestration in this case was set aside upon an informality; it may be of importance to see from the record what was done therein in the subsequent proceedings between these parties.

The judgment is of great importance, in regard to the effect of a clause in a disposition burdening the subjects conveyed with payment of the grantor's debts; and appears to form a leading case thereon.

Case 81. Sir Alexander Cuming, of Culter, Bart. - *Appellant*;  
The Moderator and Presbytery of Aberdeen, and Mr. Wm. Abercromby, - *Respondants*.

18th April 1721.

*Writ.*—A deletion, and a marginal note signed by the grantor of a deed, neither of which were noticed in the testing clause, being held to be null, the judgment is reversed.

*Clause*—A minister, who was also patron of his parish, being deprived of his benefice by the presbytery, conveys his right of patronage to a purchaser, reserving his own right as minister or preacher: the Court having found that the disponee had not; nevertheless, the right of presenting during the grantor's lifetime, the judgment is reversed.

IN April 1679, Lord Torphichen conveyed the advocation, donation, right of patronage, and teinds, of the church and parish of Maryculter, in the diocese of Aberdeen, to Mr. George White, then minister of the gospel at the said church: and infestment was thereupon taken in Mr. White's favour in October 1683.

Mr. White being libelled by the presbytery of Aberdeen, for having been guilty of scandal and treason during the late rebellion, in preaching and praying for the pretender, he was, after 55 years possession, deprived by the presbytery on the 4th of April 1717.

In August thereafter, Mr. White, by a disposition bearing to be for an onerous cause, disposed and conveyed to the appellant the aforesaid advocation, donation, right of patronage, and teinds. Part of this disposition was of the following tenor:

"Likeas I, the said Mr. George White, by these presents, "sell, annaizie, and dispone from me, my heirs, and successors "whatsomever, to and in favour of the said Sir Alexander "Cuming, his heirs and assignees, heritably and irredeemably, "but any manner of redemption, reversion, or regrefs for ever, "all and hail the advocation, donation, and right of patronage, "of the parish church of Maryculter, with the hail fruits, "profits, and emoluments belonging thereto, lying within the "diocese of Aberdeen, and sheriokdom of Kincardine; together "with all right, title, interest, and claim of right, that I, my "heirs, and successors, predecessors and authors, had, have, or "any ways may have, claim, or pretend to the said right of patronage, or to the teinds, great or small, parsonage or vicarage, "in any manner of way in time coming, either as titular or "otherwise. Reserving always to me;" After this, as the disposition had been first engrossed, stood the following words, "My life-rent right of the benefice of the said church during all the "days of my lifetime, as not acknowledging any vacancy therein." These words, however, were drawn through with a pen, but so as still to remain legible; and opposite to them, on the margin, was written

written this marginal note: "To me, the said Mr. George White, all right, title, interest, claim of right, that I can pretend as minister and preacher of the word of God in the said church, during all the days of my lifetime."

This deletion and marginal note occurred three times in the disposition: the marginal note was duly signed by Mr. White, but no notice was taken of it, or of the deletion in the testing clause. Upon this disposition the appellant was infeft in September 1717.

The appellant afterwards tendered a presentation of three or four persons, or any of them that should be approved of by the presbytery and other church judicatories to serve in the said cure, and applied to the moderator of the presbytery of Aberdeen, to call a presbytery and receive his presentation. Having met with delay, he renewed his requisition to the moderator, under form of instrument by a notary public. The appellant afterwards made application to the provincial synod, to interpose their authority, and order a presbytery to meet *pro re nata*. But that synod having refused to do so, the presentation was again tendered to the moderator of the presbytery, and to the moderator of the synod in a full convention; and the appellant entered his protestation, that their so refusing should not prejudice his right of presentation after six months, nor give the presbtery the benefit of presenting, *jure devoluta*.

After the lapse of six months, the presbytery presented the respondent Mr. William Abercromby to this church and parish; and upon their presentation he was accordingly instituted. The appellant again protested against this; and afterwards brought an action of declarator before the Court of Session against the respondents, concluding that his right might be ascertained, and that the proceedings of the presbtery in presenting Mr. Abercromby might be declared void; and that the appellant might be at liberty to dispose of the intermediate profits of the living for pious uses within the said parish, in terms of the act of parliament in that behalf.

10 Aug.  
c. 19.

The respondents made defences stating, that the disposition was null and void, by the deletion of several clauses therein; and the marginal notes not being mentioned in the testing clause, it was to be presumed that the deed was vitiated *ex post facto*. That the *saline* also appeared to have been razed, which afforded an additional argument against the disposition. The appellant, in answer contended that it was *jus tertii* to the respondents to object to Mr. White's disposition; that it and the *saline* could never be taken away but by improbation. And Mr. White appeared judicially in process, and declared that the deletions and marginal notes were done by his express order, and duly executed by him.

The Lord Ordinary, having reported this matter to the whole Court, their lordships at first repelled the objections founded upon the obliteration and rasure of the disposition and *saline*; and found that the appellant had the right of patronage of the said church of Maryculter,

But

But the respondents having presented a reclaiming petition, after answers for the appellant, the Court, on the 19th day of February 1720, "sustained the defence proponed by the presbytery, and assilzied from the declarator."

The appellant thereupon reclaimed; and the respondents having made answers, the Court, on the 6th of December 1720, "declared the appellant's right, with this quality, that his right of presentation cannot take place during Mr. White's lifetime."

The appellant again applied by petition against this last interlocutor, and offered to prove, by the oaths of the grantor, writer, and instrumentary witnesses, that the deletions and amendments were made by Mr. White's order before the execution of the deed: and the grantor at same time tendered his oath thereupon, and declared that he meant no more by the words deleted, or by the marginal notes added to the deed, and signed by him, than a reservation of his right as preacher and minister; but did not pretend any right to the patronage. After answers for the respondents, the Court, on the 30th of December 1720, "adhered to their interlocutor, and refused the desire of the petition."

Entered,  
23 Jan.  
1720-1.

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session in Scotland, of the 19th of February 1720, and from part of an interlocutor of the 6th of December, and likewise from an interlocutor of the 30th of December, 1720."

#### *Heads of the Appellant's Argument.*

1681, c. 5. There is no law, statute, or custom for making void any writing, by reason of any deletion, amendment, or marginal note, duly made and signed by the grantor. For all that the act of parliament, in relation to probative writs, requires, is, that the names and designations of the writer and witnesses be insert in the body of the writing, as they are in this case. And Mr. White has appeared judicially, and acknowledged the disposition, as it stands, to be a true deed, *simul et semel*.

Neither the respondents, nor any others who were not parties nor privies to the deed, could object or found upon the clause or reservation in favour of the grantor; none but the grantor himself or his heirs could do this; especially against his own declared will and intention. And Mr. White never pretended any right to the patronage, or to object to the appellant's presentation, having only reserved his right and interest as preacher of God's word at the said church; of which he then conceived himself unjustly deprived.

Mr. White, the grantor, neither did nor could pretend, by the clauses deleted, which now *pro non scriptis habentur*, nor by the clauses on the margin signed by him in place thereof, any right, even as preacher of the word of God at the said church, but such a right as he had *de jure*; for it was never intended, that he should reserve a right which he had not. And it is surely very improper for

for the respondents to found upon any pretence of right he had; after they themselves, as judges, had determined that he had forfeited his right.

As the reservation of Mr. White's right as preacher of God's word, could not create any nullity in the appellant's title; so the presbytery were not judges of the validity or nullity of the disposition, which indeed they never saw nor looked upon, till the action was brought against them in the Court of Session. And therefore that could be no motive for them, in contempt of the law, and even contrary to the very act of parliament which first institutes presbytery, to reject the appellant's presentation; or an excuse for their judging at any rate of the appellant's title, far less for condemning it prophetically, without seeing it. 1592.c.116.

#### *Heads of the Respondents' Argument.*

The rasure is in the most material part of the deed, relative to the present question, which is, whether the appellant can present to this church or benefice during Mr. White's life? That entirely and solely depends upon the import of the words so razed.

Taking the words razed to have been what the appellant insists, they are a sufficient bar to his claim; for a reservation of the benefice to Mr. White during his life, will as effectually prevent the appellant from presenting during Mr. White's life, as a reservation of the right of patronage, for life; for there seems no possibility in this case to distinguish them.

Though the appellant had given evidence, as he offered to do, by Mr. White the grantor, and the instrumentary witnesses, that the rasure was made, and marginal notes added, before the execution of the deed, yet that would not now supply the defect; since by the law and constant usage of Scotland the deed itself ought to have mentioned the rasure to have been made, and the marginal note added before the execution, otherwise it is null; nor can that defect be supplied by witnesses.

Were evidence to be used, yet Mr. White's evidence in this case could not be admitted, for he was a party to the action, and the person for whose use it was carried on, and who, if the church could be kept vacant, would enjoy the profits of the living: and the instrumentary witnesses are likewise suspicious, since the one is son to the grantor, and the other servant to the appellant.

The appellant at first did not insist, that these alterations were made upon the deed before its execution, but only before he signed the presentation in question; and indeed it appears from the very face of the deed, that the alteration was not made before the deed was executed. For the very same rasure and marginal notes that are in the disposition, are likewise in the feisin, and yet this last is dated 40 days after the first.

Taking the words, as they stand on the margin, viz. "Reserving to Mr. White all right, title, and interest, that he could pretend to as minister and preacher of God's word in the said church during all the days of his lifetime," they are a certain

tain bar to the appellant to present any other during Mr. White's life, for otherwise the reservation imported nothing.

The appellant seems to be too hasty in praying that his right to present, and power to dispose of the profits during the vacancy might be declared and affirmed; for that with submission could not be done, even were the interlocutors complained of reversed; for it will still remain a question, if the appellant, (were his right of patronage established) have duly executed that right, and regularly presented. That question never was before the Court of Session, and is still open and undetermined, and so long as that remains a question, the appellant cannot pretend to have any right to dispose of the vacant stipends, because it does not, and cannot, appear there is a vacancy, till that other question be determined.

Judgment,  
18 April,  
1721.

After hearing counsel, *It is ordered and adjudged, that the said interlocutor of the 19th of February 1720, and so much of the interlocutor of the 6th of December as is contained in these words, "with this quality, that his right of presentation cannot take place during " Mr. White's lifetime," and the interlocutor of the 30th of December 1720 in affirmance thereof, be reversed.*

For Appellant, *Rob. Raymond. Tho. Kennedy. Wm. Wynne.*  
For Respondent, *Ro. Dundas. Will. Hamilton.*

**Case 82. The Commissioners and Trustees of the  
Forfeited Estates, - - - Appellants;**

**Mr. David Erskine of Dunn, one of the  
Senators of the College of Justice, - Respondent.**

19th April 1721.

*Compensation against an Assignee.—Forfeiture for Treason.*—A bond of Lord Panmure's was conveyed to an onerous assignee on 21st April 1716; by an act passed on 7th May 1716, his lordship was attainted of treason from November 1715: the holder of the bond, in January 1717, acknowledged upon oath, that he had purchased in April or May 1716, from Lady Panmure, as her husband's attorney, a quantity of grain, and had paid her the price: the trustees for forfeitures found that the bond was compensated against the assignee; and that an arrestment used on 9th May 1716, and a hornring signeted on October thereafter, were no sufficient intimation: but their judgment was reversed by the Court of Delegates, and such reversal affirmed upon appeal.

**BY** an act of 1 Geo. 1. which received the royal assent on the 7th May 1716, James Earl of Panmure was attainted of high treason, from the 13th of November 1715, and his estate was vested in the appellants for the use of the public from the 24th of June 1715.



In June 1717, the respondent entered a claim before the appellants, upon the Earl of Panmuire's estate for the sum of 5000 merks, with interest, since Candlemas 1715, as assignee of a bond granted by the said Earl of Panmuire. The circumstances as stated by the respondent were, that the earl having borrowed from George Dempster, merchant in Dundee, the said sum of 5000 merks, the earl, for repayment thereof, granted Dempster his bond on the 5th of February 1715; and on the 21st of April 1716, Dempster, in consideration of the respondent's paying to him the principal and interest then due upon the said bond, assigned the same to the respondent; who thereupon arrested the rents in the tenants' hands, on the 9th of May 1716, and a horning was signeted the 26th of October thereafter.

To this claim, the appellants objected that Dempster, the assignor, had, upon oath before the appellants on the 24th of January 1717, acknowledged that in April or May 1716, he had bought from the late Countess of Panmuire, who was factrix for the earl, wheat and meal, to the value of 375*l.* 10*s.* 9*d.* Scots; and that he paid the price thereof to the Countess, and got her discharge for the same: that this payment, being after the forfeiture, was in Dempster's own wrong; and that consequently he stood debtor to the appellants in as much as would compensate the bond claimed on.

The appellants, by their decree in October 1719, "found that  
 " no legal intimation was made of the said assignation by the said  
 " George Dempster, to the trustees, preceding the date of the  
 " said Dempster's deposition made the 24th of January 1716-17,  
 " upon record in this court, and now read, whereby he acknowledges that he, the said Dempster, received the sum of 375*l.*  
 " 10*s.* 9*d.* Scots, out of the said estate, for crop 1715, and  
 " other very considerable sums; and he not having yet accounted  
 " to the commissioners and trustees for the same, the horning  
 " produced for the claimant, though bearing date before the  
 " time of the cedent's said deposition, yet is after the attainder  
 " of the said late Earl, and no charge was used thereupon; and  
 " therefore find the said sum of 5000 merks Scots money, with  
 " interest thereof, so assigned by the said Dempster to the  
 " claimant as aforesaid, to be extinguished by compensation, to  
 " the extent of the said sums intromitted with by Dempster;  
 " and do therefore dismiss the said claim, in so far as the same is  
 " compensated as aforesaid, together with the penalty contained in  
 " the said bond, which penalty is hereby absolutely disallowed;  
 " but as to the residue of the said debt not thereby compensated,  
 " the said commissioners and trustees do find that the same is a  
 " just, true, and lawful debt, to which the said claimant is justly  
 " entitled, as a lawful creditor on the said estate."

Against this decree, the respondent presented his appeal to the Court of Delegates; and after a hearing of the cause, and memorials given in by the parties, the Court of Delegates, on the 23d of December 1720, "reversed the aforesaid judgment and  
 " decree of the said commissioners and trustees."

Entered,  
3 Feb.  
1720-1.

The appeal was brought from "a decree of the Lords Delegates of the 23d of December 1720."

*Heads of the Appellants' Argument.*

It is an undoubted principle of the law of Scotland, that where the same person is debtor in a sum, and has a counter claim against his creditor for the like sum, that those claims are mutually extinguished by compensation, in the same manner as if each claim had been paid and satisfied by the person who was debtor in it; and consequently, granting it were true (which the appellants know not) that the 5000 merks pretended to have been owing by the late Earl of Panmuire to Dempster, formed a true and lawful debt, yet the public being now in the room and right of the late Earl of Panmuire, and Dempster having become debtor to the public for the rents of the estate of Panmuire, equal to the extent of his debt, levied by him without just title after the forfeiture, that debt was thereby extinguished by compensation, or payment out of the effects of the debtor, and could not after that be lawfully assigned to the respondent, or any other person whatsoever.

It was objected, that Dempster's oath was not a good proof against the respondent, his assignee, for an onerous consideration: but the oath of the cedent is a good proof in many cases, even in prejudice of the assignee. Such as, first, if the debt be rendered litigious, before the assignation, which is the present case; since by the forfeiture all the debts on the forfeited estate were made subject to a question, and claimants were put under the necessity of proving their debts to be true debts, otherwise they could not be allowed as a charge upon the estate. The oath of the cedent is likewise a good proof against the assignee, where the assignation is not completed by being lawfully intimated to the debtor in the method the law directs, which is likewise the present case; for the respondent's assignment never was intimated in a legal way.

It was objected also, that Dempster's oath must be taken with all its intrinsic qualities; and at the same time that he swears to the receiving of the grain, he swears he paid for it to the late Countess of Panmuire. But the paying for the grain is not an intrinsic quality: if there was any payment, it was a considerable time after; his oath is a good proof against himself, but it can be no proof for him. If he did pay it, it was an unlawful payment; for the law directs the profits of forfeited estates to be answered and paid into the receipt of exchequer, not to the wife of a forfeiting person.

The time of Dempster's intromission, and pretended discharging himself of this and other debts, happening so precisely about the same time, is a convincing proof of the contrivance entered into by the parties to cover the estate from the public. It signifies nothing what was the date of this simulate assignation, but only of the time of the legal intimation; and in this case there was no legal intimation before entering the respondent's claim. An assignment

restment in the tenants' hands was indeed used after Dempster's intromissions, but that was no notice to those concerned for the public, who came in place of the forfeiting person: Letters of horning were afterwards obtained in the month of October 1716 against the debtor, the Earl of Panmuire, which looks yet more extraordinary, he being then undoubtedly attainted. And all such processes used against forfeited estates, are already by act of parliament, declared to be void, and of no effect.

*Heads of the Respondent's Argument.*

As the only foundation for this demand against Dempster is his own oath, so that must be taken altogether, which is very far from establishing him a debtor to the late Earl of Panmuire; for he only swears, that he, as a merchant, in the ordinary course of his business, purchased from the late Countess certain quantities of grain, and thereupon made payment to her of the agreed price. So what he bought was from the lady, and he has paid for what he so bought.

Though the act for attainting the said earl did by a retrospect attain him from the 13th day of November 1715, unless he should surrender himself on or before the last day of June 1716; yet in fact this bargain was made by the Lady Panmuire, factrix for her husband, and the money paid to her before ever that act of parliament passed into a law (a): so that were the debt even in Dempster's own person, it were a great hardship indeed to oblige him who had once paid the money, for the purchase he *bonâ fide* made, to pay it over again. If the appellants have any demand, it is against the Lady Panmuire; and in fact, the appellants do charge her with this very sum.

Whatever might have been said, in case the debt had still been in the person of Mr. Dempster, yet that cannot militate against the respondent, an assignee for an adequate valuable consideration, without any manner of notice of this pretended demand, or title of compensation: and were it the case, that Dempster had by his oath established himself a debtor to the late Earl of Panmuire, yet to insist that that debt should compensate and extinguish a debt against a just assignee, who paid a valuable consideration for it, were introducing a great hardship indeed.

Besides, compensation is never allowed against an assignee, but where the debt is liquidated and established against the assignor before intimation of the assignment. Now this debt is not yet liquidated against the assignor, for it cannot be said that his oath liquidates the debt, because he swears that the debt is paid; nor can it be done without an action between Dempster and the appellants.

The assignment was intimated by raising and executing arrestments on 9th May 1716. Dempster's oath was not made till January 1716-17, and nothing is more certain in the law of

(a) The act was passed 7th May 1716; Dempster's oath speaks generally to the time of his transaction with Lady Panmuir, as in April or May 1716.

Scotland, than that diligence by arrestment is as sufficient an intimation of an assignment, as a personal intimation under the hand of a public notary to the obligor; and this was the most proper way, since the obligor was not to be found; and a homing was likewise signetted thereon.

Judgment,  
19 April  
1721.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed: and that the decree of the Lords Delegates in Scotland, therein complained of, be affirmed.*

For Appellant, Rob. Raymond. Rob. Dundas.  
For Respondents, Charles Erskine. Will. Hamilton.

Case 83. William Duff of Dipple Esq; - - Appellant;  
George Gordon of Glastirum Esq; - - Respondent.  
*Et c contra.*

21st April 1721:

*Real and Personal.*—A disposition is granted by a father to his son of the paternal estate, burdened with all debts contracted or to be contracted by the father; in a question between an onerous purchaser of the said estate, and an assignee of two personal bonds granted by the said disposer, the Court found that the debts were a real burden upon the subject disposed; but their judgment is reversed.

*Writ.*—The writer of a bond is designed “Patrick Gordon, servant to Mr. Alexander Dunbar;” the Court of Session found this a nullity. Upon this point the House of Lords did not decide, but dismissed the appeal.

*Homologation.*—It was alleged that the grantor of the bonds had homologated the same by payment of interest, &c; the Court found that such alleged homologation did not hinder the onerous purchaser of the estates before mentioned, from questioning these bonds: upon this point also the House of Lords did not decide, but dismissed the appeal.

BY a contract, executed previous to the marriage between Sir Alexander Innes, and Mrs. Jane Rollo, in 1678, Sir Alexander bound himself to settle the lands of Coxtown, and other therein particularly mentioned, upon the heirs male to be procreated of that marriage; whom failing to his heirs male of any other marriage, with several other substitutions of heirs. And Sir Alexander afterwards in 1707, by a disposition reciting the said marriage-contract, conveyed the said lands to his eldest son George, the heir male of the marriage, with other substitutions of heirs, with and under the burden always of payment of all the lawful debts contracted, or to be contracted by the said Sir Alexander Innes, and particularly of the payment of his younger children's provisions: all which debts and deeds the said George Innes becomes by his acceptance of the said right, tied, bound, and obliged to satisfy, pay and perform, as if they were specially set down, and in the same manner as the said Sir Alexander is bound and obliged therefore himself, with and under which provisions and conditions the right and disposition is declared to be granted and accepted, and no otherwise.

In 1712 Sir George Innes, after his father's death took a charter from the crown upon the procuratory of resignation contained in the said disposition, and the several provisions of the disposition 1707, were repeated in this crown charter. He afterwards sold the said lands to the appellant Mr. Duff, for an onerous consideration, being about 25 years purchase of the rents; and Mr. Duff was infest on a disposition from Sir George on the 10th of July 1714. Mr. Duff applied part of the price in the discharge of such debts as appeared from the records to be charged on the estate, and paid the remainder of the price to Sir George.

In 1719 the respondent Mr. Gordon, who had acquired right in 1718, by assignation, to certain bonds executed by Sir Alexander Innes first mentioned, brought an action before the Court of Session against Sir Alexander Innes, a minor, son of the said Sir George, as representing Sir Alexander his grandfather, and concluded to have the lands of Coxtown adjudged to him in satisfaction of his demand. The appellant Mr. Duff appeared as a defender to this action, and stated that he was a purchaser of these lands for a valuable consideration without notice of these bonds, upon which Sir Alexander had never been inhibited, and that none of these bonds were put upon record till 1720, six years after his purchase. But the respondent insisted, that his demand was a real lien upon the lands in question, because by the disposition by Sir Alexander to his son Sir George, under which the appellant claimed, Sir George was expressly charged with the payment of all Sir Alexander's debts, and therefore had a right to adjudge.

After a report by the Lord Ordinary, the Court, on the 2d of December 1719, "found that the debts were a real burden upon the subject disposed." And on the 1st of January thereafter, "adhered to their former interlocutor."

Mr. Duff the appellant afterwards took an objection to two of the bonds, claimed on, upon the act 1681. c. 5. In these two bonds the testing clause runs thus: "written by Patrick Gordon 1681, c. 5. servant to Mr. Alexander Dunbar;" which was, he contended, no valid description. To this Mr. Gordon answered, he could prove that Dunbar lived at Castle Gordon where the bonds were executed, and had at that time a servant called Patrick Gordon. The Lord Ordinary at first repelled the objection, but the appellant having reclaimed, after answers, the Court on the 13th of February 1720, "found that Patrick Gordon the writer of the said two bonds so granted by Sir Alexander Innes, is not sufficiently designed therein; and therefore sustained the nullity proposed against the said two bonds."

The respondent Mr. Gordon afterwards pleaded, that Sir Alexander had homologated these bonds, by paying part of the interest due thereon; and drawing a bill upon his factor for part of the principal, but which was not paid. The appellant answered, that there was no proof, that any interest was paid, and that the bill drawn upon the factor had no relation to the bonds in question. The Court on the 25th of February 1720, "found that the homologation alleged by Mr. Gordon did not hinder

" Mr. Duff from questioning the bonds pursued on, and therefore adhered to their former interlocutor, finding the writer of these two bonds not sufficiently designed, and refused the decree of the petition." And the Court afterwards on the 9th of June 1720, adhered to this last-mentioned interlocutor.

Entered,  
19 Dec.  
1720.

Entered,  
13 Jan.  
1720-1.

The original appeal was brought by Mr. Duff, from " an interlocutory sentence or decree of the Lords of Session of the 2d of December 1719, and the affirmance thereof, the 1st of January following ;" and the cross appeal was brought by Mr. Gordon, from " several interlocutory sentences or decrees of the said Lords of Session of the 13th and 25th of Februray and 9th of June 1720."

*On the original Appeal: Heads of the Appellant Duff's Arguments.*

Purchasers are always safe by the law of Scotland, when no debt nor incumbrance upon the land to be purchased appears upon record, that is what the law construes to be notice, and to charge a purchaser in any other way must unhinge all manner of securities, and defeat the very intention of the laws, with regard to the recording of titles in Scotland. The general clause in the disposition subjecting the son to the payment of the father's debts, could be no notice to the purchaser what these debts were, since neither were they upon record, nor particularly mentioned, which ought to be done when such debts are intended to be a real charge upon the estate. In the case in question, even no suit was commenced either against Sir Alexander or Sir George his son, till some years after the appellant's purchase.

This argument is still stronger against the respondent, who purchased or got an assignment of these debts in question, even after the appellant's purchase; of which he could not but have notice, for the purchase was treated of some months before it was made, and publickly known in the country; the appellant was infest, and that infestment registered, and the respondent, who lived within a few miles of the appellant, could not but know of all this transaction.

It does not appear to have been the intention of Sir Alexander to make these debts a real charge upon his estate; for as there are no particular debts specified, so the clause can import no more than that the son should not use his right of fee in fraud of the creditors, but that he should be bound to pay them, that is, he personally. The payment is directed upon the person, receiver of the rights, and not upon the subject. The express words of the deed are " that the grantee shall only be subject to the payment of the debts, in the same manner as the grantor himself was." The grantor was only bound personally, and these debts were no real lien or burden on the lands in his person, and consequently they cannot be so in the person of the son.

The proviso subjects the grantee to the payment, not only of the debts then contracted, but also of what he should afterwards contract. These last, of their own nature, could not be real; and it seems pretty incongruous that any debt not real at the time of the con-

con-

- conveyance should afterwards become real without any diligence done by the creditor (a).

*On the cross Appeal: Heads of the Appellant Gordon's Argument.*

Both the bonds in question are of the same date, bearing the same designation of writer and witnesses, dated at the same place, and subscribed without the least variation in form, an argument the writer designed himself as usual; besides the intention of the act of parliament is sufficiently attained, that was only to ascertain the writer and witnesses' names, the better to discover the truth or falsity of any deed that might be called in question; but the present description sufficiently answered that, since as to Mr. Alexander Dunbar it is certain who he was, and there was no other of that name, who had a servant by the name of Pat. Gordon, who is designed writer of this bond: and as the said Mr. Alexander Dunbar was perfectly well known to reside at Castle Gordon, where the bond is dated, so being a catholick priest, it might be some reason why he did not give himself any farther designation, which last facts, if necessary, were offered to be proved; and that he was so designed in several other writings.

The obligor in the bonds had paid part of the interest to the obligee, and in payment of part of the principal had drawn a bill upon his factor; the bill not being accepted, was protested and duly negotiated. This was a homologation by the obligor, so that he was barred from making this objection, and so consequently ought the respondent to be, who purchased the estate subject to the obligor's debts.

*Heads of the Respondent Duff's Argument thereon.*

The intention of the act no doubt was to prevent vague and uncertain descriptions, such as in the case in question; for it must be admitted if the writer had been Mr. Alexander Dunbar, without any other description, the same would not be good, because there may be several of that name: the writer then being designed servant to Mr. Alexander Dunbar, would never vary the case, since it is not such a description, as to ascertain the person, and discriminate him from others; and his being so designed in other writings can be no argument for supporting this.

The several facts insisted upon, and pretended to be made use of, in order to ascertain the person, are to no purpose, since the law expressly enacts, "that the want of a designation of writers and witnesses is not suppliable by condescending upon the designation of writers or witnesses," so that if the writer is not in the deed itself sufficiently described, that can never be supplied by any after condescendance: nay, this was the very design of this act; for the law before that time required the writer and witnesses to be designed, but then the want of that used to be sup-

(a) The argument of Mr. Gordon on the original appeal has not been found; as his counsel gave up the point of law at the hearing appeal, it is probable that he had no printed case. The argument on the other points is taken from Mr. Duff's case.

plied by an after condescendance upon a proper description of writer and witnesses; and to prevent the inconveniences arising by such condescendance was the principal view of this act.

There is no proof that any such interest was paid, it being only founded on the obligee's own allegation; and the bill drawn by the obligor upon his factor has no manner of relation to the bonds now in question; and even the payment of interest by the obligor could not have been pleaded in bar to any suit brought by the obligor himself to set aside a deed or obligation declared by law void and null, much less can it be made use of against the respondent, who is a purchaser for a valuable consideration, without any notice of this debt, and consequently is entitled to protect his purchase by the nullities arising from the face of the obligations themselves, which are made use of in order to affect his purchase; and he is the rather justifiable in insisting upon the strictness of the law, since he has already paid a full and adequate price for the estate in question.

Journal,  
21 April  
1721.

Counsel being this day called in and heard upon the appeal and cross appeal, and the several answers thereto, *the counsel for the appellant, William Duff, having opened the matter of his appeal, and shewn* "that the complaint of the interlocutors finding the bond debts in question real burdens on his estate is founded upon a point already adjudged by this House?"

*The counsel for the respondent, George Gordon, admitted it to be so, and therefore would not enter into the defence of the said interlocutors: and further declaring* "that he, looking upon the reversal of these interlocutors to put an end to the whole contest between the parties to these appeals, declined to trouble the House with arguments in support of the bonds in question, against the interlocutors complained of by the appeal of the said George Gordon."

*Wherefore the counsel for the said William Duff prayed,* "that the appeal of the said George Gordon be dismissed."

Judgment.

*And upon due consideration had of what was offered on either side in the said causes, it is ordered and adjudged, that the said interlocutor of the 2d of December 1719, finding the bond-debts real burdens upon the estate in question, and the interlocutor of the 1st of January following, in affirmance thereof be reversed; and that the petition and appeal of George Gordon, complaining of the said interlocutor of the 13th and 25th of February 1720-1, and the interlocutor of the 9th of June last, in affirmance thereof be dismissed; without prejudice to any demands the said appellant George Gordon may have upon the two bonds in question against any other person beside the said William Duff the original appellant.*

For William Duff.      Ro. Dundas.      Will. Hamilton.

It was in the case *Lord Lovat v. Emilia Dowager Lady Lovat and others*, 1st April 1721, No. 80 of this collection, that the point of *real and personal*, noticed in the judgment was decided. The judgment here reversed upon that point is noticed in the Dictionary as an existing case, *voc. personal and real*, vol. 2. p. 67.



*Ex parte*

David Falconer of Newtown Esq; - - - *Appellant*; Case 84.

Dame Elizabeth Falconer, Relict of Sir Charles Ramfay, late of Balmain Bart., Sir Alexander Ramfay, now of Balmain, Mr. David Archer, Minister of the Gospel at Laurencekirk, or Conveth, and Mr. Robert Mortimer, Schoolmaster there, - *Respondents*.

4th May 1721.

*Presumption.*—Two mortifications for educating children at a parish school, are found in the grantor's repositories after his death; the one bore date four years after the other, but was in same terms with the first, with this alteration only, that a larger sum was mortified, and a greater number of boys to be educated: the Court having found that both substituted as distinct deeds; the judgment is reversed.

The Court having also refused a proof by the instrumentary witnesses, of the donor's intention; their judgment is reversed, and liberty given to examine the instrumentary witnesses.

ON the third of June 1712, Sir Alexander Falconer, late of Glenfarquhar, the appellant's uncle, deceased, by a deed reciting, that in regard it had pleased God, in his mercies, to increase and bless his means and effects, and lengthen his days to a very great age; Therefore, out of the charitable regard he had to the education of poor children, either of his own name, or born within the parish of Conveth, where his predecessors lived and resided, and for the encouragement of letters and learning, he left and appointed the sum of 50 merks Scots, and 18 bolls of meal, to be paid yearly by his heirs out of the lands of Middleton, for the uses following, viz. the sum of 50 merks to be paid yearly to the schoolmaster at the church of Conveth, for his encouragement, who should therefore be bound to teach the children of poor men, who were not able to pay schoolmasters' fees, gratis; and the said 18 bolls of meal for maintaining three boys, at the rate of six bolls of meal yearly; which boys should be presented by his heirs and successors, of the name of Falconer, to be paid by two half-yearly payments, and to commence at the first term of Whitsunday or Martinmas after his decease. And the said boys were to wear a badge.

The said Sir Alexander Falconer, by another deed, bearing date the 7th of August 1716, with the same recital verbatim as the former, appointed 40*l.* Scots (being 60 merks) to be paid to the schoolmaster at the church of Conveth yearly, and 24 bolls of meal, for the maintenance of four poor scholars, payable out of the same lands, by the same payments, and to be presented in the same manner as the former. In both deeds the respondents were appointed trustees.

Sir

Sir Alexander dying soon after, the appellant, his nephew, succeeded as heir to his estates. After his death both the said deeds of mortification were found amongst his papers. The appellant apprehending that it was not the intention of Sir Alexander that both deeds should subsist, but that the latter deed should supersede the former, declined to pay any but the last. The respondents, however, insisting upon both, the appellant in 1719 brought his action of reduction and declarator, before the Court of Session, to set aside the first mortification, and to have it declared that the last was the only subsisting deed: and the respondents brought a counter action to have it declared, that both were subsisting deeds.

These causes coming to be heard before the Lord Ordinary, his lordship, on the 20th of June 1720, "found, that it is to be presumed, that the second mortification came in place of the first, and that the first became thereby extinct, and declared accordingly."

The respondents represented against this interlocutor, and the appellant having made answer, the Lord Ordinary reported the case to the Court, and their lordships, on the 7th of December 1720, "found that the two mortifications subsisted as two separate donatives."

The appellant reclaimed against this interlocutor praying, amongst other things, that since both deeds were found among the grantor's papers, after his decease, and since they were both drawn and written by a learned gentleman at the bar, who was a witness to the execution of both, he might be at liberty to examine that gentleman and the other instrumentary witnesses as to the directions given to the said gentleman for preparing these deeds, and what declarations the grantor had made; and whether it was intended by the grantor that both should subsist, or that the second was to include the first, and that only subsist. After answers for the respondents, the Court, on the 23d of December 1720, "adhered to the former interlocutor, and refused the desire of the petition."

Entered,  
23 Jan.  
1720-1.

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session of the 7th of December 1720, and the affirmance thereof of the 23d of the same month."

#### *Heads of the Appellant's Argument.*

As the grantor has not in his last deed declared that both should subsist, so it seems apparent that it was not his intention they should. In both deeds there is contained the same recital without any variation; they are to have the same commencement, to be paid at the same terms, and differ in nothing but that the second gives a larger salary, and appoints one boy more to be educated: therefore, as when the first was executed, the grantor intended only to have three boys educated, he appointed a proper maintenance for them, and a suitable encouragement to the schoolmaster; so afterwards intending to add one boy more to be maintained,  
he,

he, by the second deed, made an additional allowance for that boy's maintenance, and likewise gave to the schoolmaster, an additional allowance for his trouble: but he cannot be thought to have intended seven boys to be educated. It seems a natural construction that the last was intended to include, and be an addition to, the first.

Should there be any difficulty as to the construction of these two deeds, and should it appear uncertain what was the intention of the grantor, (which ought to be the rule of construction in voluntary grants of this kind) the method proposed by the appellant in his reclaiming petition was regular and proper. The gentleman, who by the grantor's directions drew both deeds, is alive; he wrote them both, and is an instrumentary witness to their execution; and he cannot, certainly, but know what the grantor declared to him in relation to these deeds, and what his intention was as to the subsisting of both, or only of the last.

*Whereas this day was appointed for hearing counsel ex parte upon this petition and appeal; and counsel appearing for the appellant, but no counsel for the respondents, and the appellant's counsel being heard and withdrawn, It is ordered and adjudged, that the said interlocutor of the 7th of December last, finding the two mortifications subsisted as two separate donatives, and the interlocutor of the 23d of the same month, in affirmance thereof, be reversed: and it is further ordered and adjudged, that the appellant be at liberty to examine the instrumentary witnesses, according to his petition to the Lords of Session for that purpose; and such further proceeding shall thereupon be had before the Lords of Session as to justice shall appertain.*

Judgment,  
4 May  
1781.

For Appellant. Rob. Raymond. Will. Hamilton.

Cafe 85. Janet Maxwell of Cowhill, and Charles  
 Maxwell her Husband, - - - *Appellants;*  
 George Sharp of Hoddam, Advocate, Son  
 and Heir of John Sharp of Hoddam,  
 deceased, - - - - - *Respondent.*  
*Et c contra.*

10 May 1721.

*Judicial Factor.*—A person who had become surety for a judicial factor, and afterwards had a deputation from him, could by no right acquired during the factory invert the heir's possession: he could not retain possession till his debts were paid, but must pursue for them as accords.

He is also found liable in terms of the act of sederunt, 31 July 1690, in annual-rent for what he received or might have received within one year after the same grew due. He was entitled to no factor-fee, having disturbed the possession of the factor by virtue of other rights and titles in his own person.

*Commissary Court.*—This could not give decrees of preference among competing creditors.

*Process; Decree.*—In a decree, a former decree being founded upon as the ground thereof, and such former decree not pronounced, the second decree was null.

*Annual-rent.*—Aliments to children were to be imputed to the rents of the years in which they were paid, and not deducted out of the annual-rents due by a factor.

*Costs and Expenses.*—In the above cause, the Court having refused expenses, on a cross appeal taken, their judgment is reversed.

These costs ascertained by a committee of the House of Lords, at 640*l.*, and ordered by the House to be paid.

THE appellants in the original appeal, after their marriage in 1707, brought an action of count and reckoning and of removing, before the Court of Session, against the late John Sharp of Hoddam, setting forth, inter alia, as the grounds thereof: That Dugald Maxwell of Cowhill, the appellant Janet's father, died in 1688 seised of an estate of 200*l.* sterling per annum, or thereabout, leaving three daughters infants, of tender years, without having nominated tutors or curators to them; the appellant Janet being the eldest, to whom the estate was provided by her mother's contract of marriage: and on the petition of a relation, the Court of Session in July that year appointed one John Maxwell of Middleby, factor, to receive the rents till tutors and curators were appointed; and he granted security to be accountable for his intromissions:

That John Sharp of Hoddam, the respondent's father, who lived in the neighbourhood, devised methods to make a prey of the appellant Janet's estate: her grandfather having obliged himself and his heirs to warrant a part of his estate, which he had sold to one Roger Sossaw, against a claim of mulctures, which the Earl of Southesk claimed to have thereon, as heritor of a mill which the respondent's father had purchased for the earl: and re-  
 spondent's

respondent's father thereupon, by collusion with Soffaw, obtained decree against him on the 21st of November 1690, for a sum in name of abstracted multures; and thereupon Soffaw brought an action for his relief against the appellant Janet, and her sisters the infants, before the Commissary Court of Dumfries, of which the respondent's father was clerk: No defence was made on their part, and the claim being by the pursuer referred to the oath of the defenders, who were minors, on their not appearing to depone, Soffaw on the 16th of December 1690 obtained a decree against them for about 217*l.* sterling, and 8*l.* sterling *per annum* afterwards: and of this decree the respondent's father took an assignment the same day it was pronounced; and afterwards obtained a decree of adjudication thereon, in absence, before the Court of Session against the whole estate:

That in September 1690 John Maxwell of Barfield, a relation, was appointed tutor, but Mr. Sharp being clerk on this, the tutor never granted any security: that Mr. Sharp having also purchased various debts, or pretended debts, of the appellant's father; in 1691 through his means a petition signed by the tutor, (who was largely indebted to him) by himself and various creditors was presented to the Court of Session, stating, that Middleby's factory was only to last till tutors should be appointed, and praying that one John Macnaught should be appointed in his room:

That Mr. Sharp granted security for this Macnaught; and a deputation was first granted to one Lanerk, and afterwards to Mr. Sharp himself:

That after this factory granted, Mr. Sharp got possession of the estate on different titles acquired by him, among which Soffaw's decree for multures was one; and he continued to receive the whole rents till 1707.

The action concluded, that the respondent's father should be decerned to quit the possession, and that he should account for his intromissions with the rents, since the death of the appellant Janet's father. The respondent's father in his defences, contended that Macnaught the factor, and not he who was only security for him, should be first accountable for the rents; and that his possession was to be ascribed to the debts which he had acquired on the estate. The appellants in their answers, insisted upon a deposition made by Macnaught in an action of the respondent's father against him, in which he swore, that his name was filled up in the factory without his knowledge, and that he never did intermeddle in the matter. The Court, on the 23d of December 1707 "Found the defender's factory proved, and that "the factor could by no right, acquired during the factory, invert "the heir's possession; and ordained him to give up his possession "to the pursuers, reserving to him to pursue for his debts as accords; and found the debts acquired during the factory, relevant to be proved by writing or oath of the defender."

The respondent's father afterwards insisted upon two decrees of preference obtained against him by some of the creditors on the estate before the commissaries of Dumfries, and which he had after-

afterwards acquired right to : the appellants contended that the Commissary Court could not prefer one creditor to another. The Court on the 24th of January 1708 " Found that the commissaries had committed iniquity by inverting the factor's title or possession, and found those decrees null, and that the factor must account for the rents, and cede the possession pretended by virtue of the rights he acquired during the factory." And on the 27th of February thereafter, the Court " allowed the pursuers to prove the rental, and the defender to prove the payments made by him or others, for whom he is to count to creditors, who had legal diligence affecting the estate." Nothing being proved on this head, the Court, on the 17th of June 1709, " circumduced the term for proving."

The respondent's father having quitted possession, the action of count and reckoning proceeded, and by various interlocutors of 14th December 1710, 18th January 1711, and 19th June 1712, the defender was ordered to account, not only for the years of Macnaught's factory, but also for the years 1690 and 1691, the years of Middleby's factory, unless he should prove the receipt of the rents by Middleby.

In the mean time the defender had claimed allowance of the sum contained in the said decree obtained at the instance of Sosslaw; the pursuers objected collusion, and that Sosslaw's decree had been founded upon another alleged decree at the suit of the Earl of Southesk, which was itself void. The Court, on the 26th of July 1711, " found the decree before the commissaries void, as being founded on Lord Southesk's decree not produced in court:" and, on the 6th of November thereafter, " found the decree so founded on null."

The respondent's father dying about this time, the appellants revived the action against the respondent his son, and insisted, that in terms of the act of sederunt, 31st July 1690, directing factors appointed by the Court of Session to be accountable for the annual rents of what they did or might have received within one year after the same grew due, therefore the respondent, as representing his father, should account in that manner: he contended, that this act of sederunt was in desuetude, and had never been reduced into practice; and that though it had been revived on the 22d of November 1711, and directed that mode to be observed in all time coming, that, being long after the expiration of the factory in the present case, could be no rule of accounting. The Court, on the 12th and 25th of February 1718, " found the defender's father liable for annual rents in terms of the said act of sederunt, and directed the clerk to make up the calculation accordingly."

The respondent next claimed that his father should be allowed deduction of a salary or factor's fee; but the Court, on the 4th of February 1719, " found that the defender's father, having disturbed and endeavoured to exclude Macnaught the factor, for whom he was cautioner, and Lanerk the sub-factor, by virtue of other rights and titles in his own person, he or his

heirs

"heirs ought to have no allowance of any salary or factor's fee." And to this interlocutor the Court adhered on the 16th of July thereafter.

In making up the account between the parties, the appellants insisted that an aliment of 100*l.* Scots *per annum*, paid by the respondent's father to the appellant Janet and each of her sisters, should be deducted out of the annual-rents of the rents, and not out of the rents themselves; but the Court, on the 14th of February 1719, "found that the aliments were not to be imputed to the annual-rents of the rents of the estate of Cowhill, but were to be imputed and allowed out of the rents themselves of these years, wherein they were respectively paid and discharged."

The appellants afterwards petitioned the Court, that the defender might be found liable in expences; but the Court, on the 21st of July 1720, "found the defender ought not to be liable to the pursuers for any expence in the process." And to this interlocutor they adhered on the 26th of same month.

The original appeal was brought from "an interlocutor of the Lords of Session of the 14th of February 1719, and another interlocutor of the 21st of July 1720, and the affirmance thereof on the 26th of the same month." Entered,  
15 Dec.  
1720.

And the cross-appeal by George Sharp "from certain interlocutors of the Lords of Session, made on the behalf of the said Charles Maxwell and his wife." Entered,  
8 Feb.  
1720-1.

*On the Original Appeal.—Heads of the Appellants' Argument.*

Costs and expences of suit ought of course to be allowed to the prevailing party in all cases; and much more in this case, where the appellant Janet hath by such practices been kept out of her estate for seventeen years. The appellants have been forced to contract great debts, not only for the maintenance of themselves and their family, but also for the carrying on this tedious and chargeable process; during the whole course of which they have prevailed in every interlocutor, except only in these against the allowing them their costs and expences; for which no other reason was given, but that the respondent's father had no factor's fee or salary, which had been so justly disallowed. And though a salary had been allowed him, it would not have amounted to 50*l.* sterling, a very inconsiderable sum, if compared with the costs and expences of the action.

By the articles of regulation made by the Court of Session in 1695, ratified by act of parliament, it is expressly provided that in all cases where the Court should find the defender to be litigious, they should take an account upon oath from the pursuer of the expences and damages he had been put to, and should decern the same to be paid to him; and in case of extravagance, to modify the said expences and damages *more largely in time coming*, for the better preventing litigious suits.

The aliments ought to have been paid out of the annual rents, and not out of the rents themselves; for by the law and universal rule

rule in accounting, aliments ought to be allowed out of the annual rents, and not out of the principal sums, especially as there were annual rents in the factor's hands at the time of the different payments of the aliments. Were it otherwise the annual rents would be a dead stock for a great number of years.

*Heads of the Respondent's Argument thereon.*

It is extraordinary in any event to insist against the respondent for costs, incurred in his father's lifetime. If there was any negligence in the management of the affairs, or if any thing unjustifiable was insisted upon by the respondent's father, that can import nothing against the respondent, who was nowise accessory to it; and the respondent, in the whole of the proceedings since the action was revived against him, insisted upon nothing but what was extremely justifiable, even supposing the judges determined rightly against him. The only thing insisted upon by the respondent in which he did not prevail, was, that he coming in place of the factor should not be accountable in the strictest manner for the interest of money in the factor's hands annually; or if he were, that he might be allowed a factor's fee. To give costs against him on that account were introducing a hardship without a precedent.

But the respondent's father had all the reason in the world to defend himself in this suit. The appellants charged him with the rents of 1688 and 1689 and downward; and the Court at first found him liable for 1692, and no higher; and though he was afterwards decreed to account for 1690 and 1691, yet there were still two years overcharged. He was further charged with the payment of several sums, which the Court found he was not to be charged with: the appellants in particular stated him as indebted 1000*l.* sterling, as the value of wood cut by him, and after a long and expensive proof, they made out nothing against him. Not only was he loaded with these unjust charges, but great part of the articles of his discharge, which were allowed by the Court, were strenuously opposed and anxiously disputed by the appellants. Upon the whole the appellant's charge was for near 70,000*l.* Scots, whereas at most not one-third was due.

The aliment paid to the heirs portioners being an annual burden upon the rents must be deducted out of the rents, for the factor can only account for the free rent, *annuis debitis deductis*: and as the factor, was by the factory itself, specially obliged to pay these aliments, he could not warrantably employ the whole rents, without retaining sufficient to answer the aliments, and if he was bound to retain, he must of consequence be exempted from the interest of so much of the land rent as corresponds to that annuity.

*On the Cross Appeal.—Heads of the Appellant Sharp's Argument.*

(The appellant in the cross appeal enters into no argument on the interlocutors finding that his father as factor could not by any right acquired, during the factory, invert the possession and finding the



the decree of the commissaries in January 1708, null: he argues against accounting prior to the factory and against certain interlocutors, finding the possession of certain creditors not proved: these being founded on special circumstances are not here stated.)

To oblige a factor to account by a rental, whether he receives the rents or not, and for the value of those rents annually, is no doubt carrying things to great rigour. There is no foundation for this but the act of sederunt 1690; but this act was in *desuetude*; nor can any instance be given, where a factor, upon the footing of that act, was obliged to account so rigorously. It is true the act, was revived in 1711, but that was long after the expiration of the factory in question: and this new act thought it so reasonable that every factor should know what he obliges himself to, that it is directed to be expressly mentioned in the security that the factor is to account for interest annually. But that is not to be extended to a case, where there is no such clause, and the condition of the bond in the present case is only to make just count and reckoning of the rents he shall receive, and pay the same as the Court shall direct. Besides, whatever might be said against the factor himself, this rigorous way of accounting can never be extended to the cautioner, against whom obligations are to be strictly interpreted.

For reversing the interlocutors obliging the factor to account for the interest of the rents annually.

All factors are allowed a salary or factor's fee, and as Mr. Sharp's father accounted as factor, and that in so rigorous a manner, he ought at least to have the same privileges as other factors. Indeed the reason assigned for making a difference between this case and others seems not very intelligible. The words are "that Mr. Sharp's father had endeavoured to exclude Macnaught the factor, for whom he was cautioner, and Lanark the subfactor, from the possession, by virtue of other rights and titles in his own person, and therefore ought to have no factor's fee." When Mr. Sharp is to account, the factor and he are but one person; but when a salary is demanded, Macnaught is deemed a different person. The interlocutor in fact comes to this: Mr. Sharp disturbed himself and endeavoured to exclude himself from the possession, *by possessing*; and therefore ought not to have a salary. But the instances of that pretended disturbance are trifling; for Mr. Sharp being a creditor, might no doubt, though security for the factor, complete his diligence, in order to establish his preference in competition with other creditors. But since he has accounted rigorously as a factor, he ought to be allowed a salary. No doubt the factor and subfactor expect a salary and will not account without being allowed one.

For appointing the interlocutors refusing a salary or factor's fee.

#### *Heads of the Respondents' Argument thereon.*

(The respondents follow the appellant in the cross appeal on those points mentioned to have been founded on special circumstances.)

It would have been very unreasonable to have given Mr. Sharp a salary for resigning the pursuers in their affairs, under

his management. The charging him with interest was in terms of the act of federunt made but a little before the date of the factory.

Judgment,  
to May  
1721.

After hearing counsel, *It is ordered and adjudged that the cross appeal of the said George Sharp be dismissed, and that the several interlocutors therein complained of be affirmed: and that so much of the original appeal as complains of the said interlocutor of the 14th of February 1719, be dismissed, and that the said interlocutor be affirmed: and it is further ordered and adjudged that the said interlocutor of the 21st of July 1720, whereby the Lords of Session found Hoddam not to be liable to the appellants Maxwell and his wife, for any expence of the process, and the affirmance thereof on the 26th of the same July be reversed: and it is declared and adjudged, that the respondent Sharp is liable to the appellants Maxwell and his wife for the expences of the said suit: and it is hereby further ordered and adjudged that the said Lords of Session do cause the expences and damages of the said appellants in the said suit to be taxed and ascertained, according to the regulations in cases where defendants are litigious, and the same when so ascertained to be forthwith paid to the appellants by the said George Sharp.*

For Charles Maxwell and his Wife, *Rob. Raymond. Tho. Kennedy.*

For George Sharp,       -       -       *Ro. Dundas. C. Talbot. Will. Hamilton.*

Journal,

On the 7th of December 1722, a petition was presented to the House of Lords, for Charles Maxwell of Cowhill, and Janet his Wife, complaining "that the Lords of Session in Scotland have not caused the petitioners' expences and damages to be taxed in the suit between the petitioners and George Sharp of Hoddam, advocate, pursuant to the order and judgment of the House of 10th May 1721." This petition was referred to a committee.

On the 23d of May 1723, the committee "report, that they have considered the said petition, to them referred, and in that consideration were attended by the parties on both sides as also their agents; and having considered, what was by them offered, and likewise considered the regulations in cases where defendants are litigious, according to which the expences and damages of the petitioners by the order and judgment of this House above-mentioned were directed to be taxed, the committee in the first place were of opinion, that the petitioners were not entitled to any allowance in respect of what was claimed for interest, for their costs sustained in the Court of Session, in the suits between the petitioners, and the said Mr. Sharp; nor likewise to any allowance of costs, in respect of their appeal to this House; nor any allowance for damages for loss of time.

"The committee in the next place think proper to acquaint your lordships that a copy of the petitioners' bill of costs, which was exhibited to the Lords of Session, was laid before the committee, who proceeded to consider the respective articles thereof with

‘ with due regard to the direction contained in the said order or judgment, on hearing the petitioners’ appeal ; and having gone through the whole account, and heard as well the parties themselves, as their agents, were further of opinion, in regard the petitioners in divers particulars in their said bill of costs had made extravagant demands, they ought not to be allowed any costs in respect of the taxation of their costs : and their lordships in going through the said account, did adjust and ascertain the costs they conceive right to have been allowed in respect of the several articles charged by the petitioners, some of which were disallowed by the Lords of Session, and others concerning which the said Lords had made no determination : and having done so, the committee did then cause the several articles approved of to be cast up, which amount in the whole to the sum of 640*l*. which sum the committee conceive the petitioners are entitled to, and are of opinion the same ought to be forthwith paid to them by the said Mr. Sharp.”

On the 24th of May 1723, this report was taken into consideration by the House and agreed to, and an order made accordingly in terms thereof, “ that the said George Sharp do forthwith pay, or cause to be paid to the said Charles Maxwell and Janet his Wife the sum of 640*l*. pursuant to the said report.”

Alexander Munro the younger of Auchin-  
bowie, - - - - -

*Appellant;*

Case 86;

Grizel Bruce of Riddoch, - - - - -

*Respondent.*

17th May 1721.

*Viz et motus.*—A disposition is granted by a woman to her heir at law, reserving her own life-rent, and the court-ty of a future husband, and declaring that it should not affect the heirs of her own body, and is followed by a more formal disposition a few days afterwards, on which infestment followed : she brings an action for reduction on the ground, that being under arrest at London at the suit of a creditor, her heir had refused to bail her, unless she executed the deed first mentioned, and the bailiff threatening to carry her to Newgate, she gave her consent, and executed the deed as soon as bail was granted, and before she left the spunging-house : The Court reduces the deed and all that followed thereon ; but the judgment is reversed.

**T**HE respondent was proprietor of the estate of Riddoch and other lands in the county of Stirling, of considerable yearly value ; and she was also possessed of a considerable personal estate. Of these estates, she had executed a voluntary and revocable settlement in favour of a person in Scotland, who was a distant relation, and to whom she had also granted powers to receive her rents.

Being in London in 1714, she was betrayed into a marriage with a person of the name of Colquhoun, who had been a ser-

jeant in the Foot Guards, who gave himself out to be a man of a great estate, and who at same time was married to several other women.

The appellant, who states himself to be heir at law to the respondent, mentions, that hearing of her misfortune, he went and visited her, and in consequence of an offer from him to do all he could to relieve her, a prosecution for bigamy was instituted against Colquhoun, in which the appellant was aiding to her both with his credit and his own personal services: That the respondent thereupon declared her intention to make a settlement of her estate upon the appellant and his heirs, failing issue of her own body: That the factor in Scotland having declined to remit any money to the respondent, or to answer her bills, she incurred several debts; and in May 1715, as she and the appellant were in a coach together, she was arrested at the suit of one Cuernon an attorney: That the appellant procured bail for the respondent, and she was set at liberty accordingly; and the appellant paid all the expences of the respondent while she remained in the spunging-house: That the respondent proposed instantly to execute the deed in the appellant's favour which she formerly intended, and to put it out of her power afterwards to do deeds to his prejudice; and such deed was drawn and executed accordingly. But this first deed not being written upon stamped paper, a second deed was drawn by Sir David Dalrymple, then Lord Advocate; and this second deed, after she was admitted to bail and at her free liberty, was read over to her, approved of and executed in the presence of Henry Cunninghame Esq; a member of the House of Commons, Thomas Crawford of Lincoln's Inn, then attorney for the respondent, and Thomas Buchanan, clerk to Sir David Dalrymple; and she in the presence of these witnesses declared the said deed to be exactly according to her intentions, and that she executed the same freely and voluntarily: That by this deed, which was in terms of the former one, the respondent conveyed her real estate to the appellant, her heir at law, and the heirs of his body, whom failing, to the respondent's heirs whatsoever, reserving her own life-rent of the premises, and with a power to give any husband she should marry the life-rent thereof; under a proviso that the issue of the respondent's body should not be prejudiced thereby, but that they should have full power and liberty to enjoy the same freely as if the said right had never been past; and thereupon the appellant was incest: That after the execution of this deed the appellant continued about two months in London in perfect friendship with the respondent, assisted her in prosecuting the said Colquhoun, and furnished her with several sums of money for that purpose; and accordingly judgment was obtained against him, and he was burnt in the hand.

The respondent afterwards brought an action against the appellant before the Court of Session, to have the disposition set aside, and declared void, on the ground that the same had been obtained by concussion, and that she had been compelled to execute the same *vi et metu*.

An act and commission being granted to examine witnesses in England, witnesses were accordingly examined, and it appeared by the evidence of two of the instrumentary witnesses, that the deed in question was all read over to the respondent, several clauses were read a second time, and she approved thereof and executed the same, and declared she did it voluntarily and willingly, and that she delivered the same to the appellant in their presence; all which was after the bail-bond given, the bailiff paid his fees, and she declared at liberty; that nothing of force or constraint was used, but every thing transacted according to her own directions, and with her approbation. The appellant's witnesses swore that she was in the bailiff's house at the time of executing the deed in question; that the appellant refused to procure her to be bailed, or to give her any money, unless she would execute the said deed; and that the bailiff threatened to carry her to Newgate, and that they believed the same was executed through fear. These depositions related solely to the deed first executed.

The Court, on the 8th of July 1720, having considered the state of the process, and writs produced, and testimonies of the witnesses adduced, and having advised the same with the debate, they, by a majority of one vote, "found the reason of reduction, viz. that the disposition quarrelled was elicited from the respondent by concussion is relevant and proved, and therefore reduced the said disposition, with all that had followed thereupon:" and to this interlocutor the Court adhered on the 13th of January 1721.

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session in Scotland of the 8th of July 1720, whereby they found that the disposition quarrelled was elicited from the respondent by concussion, was relevant and proved, and therefore reduced the said disposition with all that followed thereupon; and also from another interlocutor of the said Lords, of the 13th of January 1721, affirming the former interlocutor."

Entred,  
18 Feb.  
1720-1.

#### *Heads of the Appellant's Argument.*

There is no concussion proved in this case; for where a deed is questioned upon pretence of concussion, one of two things ought to be proved; either that the restraint and compulsion were imposed by the person to whom the deed was granted; or that, though it were imposed by another person, yet it was in view and in order to extort the deed: but neither of these is found in this case. Though the respondent was in custody of a bailiff, yet that was not at the suit, nor by the procurement of the appellant, the grantee. It is not attempted to be proved that the appellant was in any concert with the person who arrested her, or that he ever saw him; and the bailiff himself swears, that it was at the suit of one Cuerton; that he never saw nor knew any thing of the appellant, till he saw him in the coach with the respondent when she was arrested. There is not the least pretence, that the re-

respondent was imprisoned with any view to compel her to execute this deed. No doubt a person in custody may execute deeds to a third party, and those deeds will subsist though they were in custody; especially in a case where the imprisonment was not at the suit of the appellant, nor of any person in concert with him.

The most that was pretended against the appellant was, that he would not interpose to relieve her from restraint and procure her bail, unless such deed was granted. Surely this was no concussion in the appellant, in order to have a deed executed that his natural right of succession should not be set aside by posterior, rash and unnecessary deeds; nor was it extortion in the appellant, that he would not interpose his credit for a person of a pretty inconstant temper, unless she would give some reasonable security not to evacuate the appellant's right of succession. There can be no extortion, but where there is some positive fact, done by the extorter, imposing the fear: but refusing to do, to interpose credit, or grant any other favour, was no extortion.

The deed itself was a rational deed, being a settlement of the estate upon the appellant her right heir, upon failure of issue of her own body: the life-rent of the whole was reserved to her; her future husband was safe as to his courtesy, and the issue of her body as to the estate. So that the only bar put upon the respondent was a stop to importunities upon her to settle the estate from the right heir, and prevent her from disinheriting the appellant.

This deed was executed willingly and freely, and so the respondent declared to the two instrumentary witnesses, and likewise to the gentleman who was bail for her. Had she been under any force, it is most probable she would then have declared it, that gentlemen of character, as they were, might have relieved her from that force. But in fact, she was at liberty when the deed was executed; the bail-bond was given, the bailiff paid his fees, and she declared to be at liberty. So, had she been under any constraint, that was at an end before the deed was signed.

All the depositions of the witnesses for the respondent respecting the appellant's refusing his assistance to her, unless she executed a deed, relate to the first deed, and not to the second, which is the deed in question. And, supposing and undue methods had been used to procure the first (which is positively denied,) there is no inference that it was so with regard to the second, nor is there any proof of it.

(The respondent's case contains no argument whatever on her part; she merely states the circumstances of the case, with regard to the first deed.)

Judgment,  
27 May  
1721.

After hearing counsel, *It is ordered and adjudged, that the said interlocutor of the 8th of July 1720, and the said interlocutor of the 13th of January in affirmance thereof, be reversed.*

For Appellant, *Ro. Dundas. Tho. Kennedy. Will. Hamilton.*  
For Respondent, *Rob. Raymond. C. Talbot.*

In the appellant's case, several interlocutors of the Court are stated as to the admissibility of female witnesses, to other facts than those within doors, and in their own houses; and as to the allowing of objections to the characters of witnesses: he also uses argument thereon, but these formed no part of the judgment appealed from.

Dr. George Middleton, - - - Appellant; Case 87.  
Mr. George Chalmers, Principal, and the  
rest of the Masters and Regents of King's  
College, Aberdeen, - - - Respondents.

9th June 1721.

*Arbitration.*—On a day appointed by two arbitrators for determining a matter, one of them declined to act, and the overman thereupon pronounced an award; the Court having reduced this award as incompetent, the judgment is reversed.

**T**HE appellant, who had been for many years principal of King's College, Aberdeen, was in 1716, among others, superseded by certain persons having his majesty's commission under the great seal of Scotland, to visit that university; and the respondent Chalmers was appointed to his place.

It being stated to these commissioners, that the appellant had received and had not accounted for certain sums of money, arising from a mortification, or grant of his late majesty King William, and for the *Bibliothek money*, which last consisted of small sums payable towards the college library, by those on whom the degree of master of arts was conferred, the commissioners directed the respondents to sue the appellant for the same.

An action was thereupon commenced, but instead of proceeding therein, on the 5th of October 1719, a submission was entered into between the appellant and the respondents, for referring the matters in dispute to the arbitration of Sir Alexander Bannerman, of Ellick, on the part of the appellant, and of Thomas Forbes, of Echt, on the part of the respondents, and in case of variance or discrepance between the arbiters, to Colonel John Buchan, of Cairnbulg, as overman or umpire, elected and chosen by both parties: by this submission the parties were bound to stand to the decree to be pronounced under the penalty of 500 merks, and such decree was to be made on or before the 8th of November 1719.

The respondents gave in their charge against the appellant, to which the appellant gave in his answers, and both parties having been several times heard before the arbiters and the overman, the arbiters appointed the 28th of October 1719, for pronouncing their

their decree. When this day arrived, Sir Alexander Bannerman declared his opinion, that the appellant should be absolved from the claim given in by the respondents; but Mr. Forbes declining to pronounce any decree, the appellant by his procurator thereupon took a protest in the hands of a notary under form of instrument; and the oversman being present, in consequence of what passed between the arbiters, appointed the next day for giving his judgment. Accordingly on the 29th of October, Colonel Buchan, the oversman, pronounced a judgment, finding and declaring that the appellant had managed the money belonging to the said mortification and library, honestly and faithfully, and that he had accounted for, and made payment and satisfaction to the master and members of the said college, of all the money he had received, and that there was no balance due to them from the appellant, and therefore absolved him from the said claim.

Of this judgment the respondents brought a reduction before the Court of Session, in which they insisted, that being only trustees, they could not properly submit these matters, which were the property of their college, to arbitration, especially since they had directions from the commissioners of visitation to sue the appellant at law; and that though they had power to submit, yet the judgment was not regularly pronounced, for though one of the arbiters did not at that time incline to pronounce an award, yet he might have done so afterwards, and his declining was not any authority to the oversman to pronounce his decree. After a report from the Lord Ordinary, the Court on the 26th of January 1721, "found that the arbiters not having differed in their opinion as to their determining in the foresaid submission, but only one of the arbiters declining to determine, the oversman was not thereby empowered to pronounce his decree, and therefore found his decree null, and decreed in the reduction." And to this interlocutor the Court adhered on the 3d of February thereafter.

Entered,  
17 March  
1740-1.

The appeal was brought from "an interlocutory sentence of decree of the Lords of Session of the 26th of January 1721, and also from another interlocutor of the 3d of February thereafter affirming their former interlocutor."

#### *Heads of the Appellant's Argument.*

The arbitrator named on the part of the respondents having declared his disagreement with the other arbitrator, and a protest under form of instrument having been taken thereon, the matter became legally and formally subjected to the cognizance of the oversman, and there was no occasion for a new reference by the arbitrators to him: His being present and fully apprised of the matters in controversy, were sufficient to warrant what he did therein, and his decree must stand good in law. By the regulation act 1695, ratified by act of parliament, no decree arbitral can be reduced; but upon proof of corruption, bribery, or falsehood, nothing of either of which is pretended in the present case.

*Heads*



*Heads of the Respondents' Argument.*

The oversman could not legally determine unless the matter had been remitted to him by the two arbitrators signing a reference, and mentioning their difference. For though the arbitrators might not agree upon an award on the 28th of October, when the appellant's son desired them to pronounce it, yet they might afterwards have agreed before the 8th of November, the time limited for pronouncing their decree. The difference of arbitrators can never be considered to be final, nor can the fact which empowers the oversman to determine be otherwise ascertained, than by a formal deed of the arbitrators declaring their difference: it were otherwise in the power of an oversman to take the determination upon himself when he pleased. The appellant, besides, had a remedy to compel the arbitrators either to pronounce an award, or to remit to the oversman. The decree of the oversman proceeds upon the recital, that the arbitrators met and differed; but of this there is no legal voucher, and there is some appearance of collusion from the good understanding which appears between the oversman and the arbitrator on the part of the appellant.

After hearing counsel, *It is ordered and adjudged, that the interlocutor of the 26th of January, and the interlocutor of the 3d of February 1721. in affirmance thereof, be reversed.*

Judgment,  
9 June  
1721.

For Appellant, *Tho. Kennedy. Sam. Mead.*  
For Respondents, *C. Talbot. Will. Hamilton.*

In the appeal cases on both sides, the question is agitated if the respondents had power to submit this matter to arbitration; but as there was no cross appeal, this matter was not before the House of Lords, and the argument thereon is not here stated.

Case 88. John Robertson of Goodlyburn, a Pauper, *Appellant* ;  
George Earl of Kinnoul, - - - *Respondent*.

5th July 1721.

*Process.—Act and Commission.*—A pursuer opposes the granting an act and commission for examining the defender, a peer in London, in a matter referred to his oath, on the ground that he being old and poor, could not follow the examination : but the commission is granted notwithstanding.

*Trust.*—A person executes an absolute surrender of his feu, in favour of his superior's son, but alleging qualifications of trust in a separate verbal agreement, the superior swears that he remembered no terms of deposition, and the son, the grantee, swears, that he personally gave no consideration for the deed, and that it was not delivered to him, but that every thing was transacted by his father ; and he never heard of any conditions or trust : it is found that the depositions did not support the allegations of trust.

**A**FTER the determination and judgment given in the former appeal, (No. 63 of this Collection), whereby the House of Lords reversed the “ interlocutors complained of, as to so much thereof whereby probation by the oath of the respondent had been refused to the appellant, or which was grounded upon such refusal, or pronounced or made in consequence thereof ; and further ordered such probation to be admitted, and that after examination of the respondent upon oath, the Lords of Session should proceed and decree thereupon as should be just ;” the appellant presented a petition to the Court of Session, praying them to summon the respondent before them to take his oath : his counsel, however, having moved their lordships for a commission to examine the respondent in England, the appellant presented another petition, setting forth that though such commissions were often granted with consent of parties, yet that no law could force him to consent ; and that the appellant was an old man and so reduced in his means, that he was not able to follow such a commission, where his presence would be necessary, his all being therein at stake. But the Court, on the 28th of July 1720, “ ordained the respondent to depone before the Ordinary, if he should happen to come to Edinburgh during the vacation ; if not, they granted a commission to take the respondent's oath at London.” And upon the 25th of November 1720, the commission was renewed upon the respondent's petition.

Interrogatories being settled by the Court, the appellant was examined thereon by a commissioner at London. The import of his deposition was, that the respondent acknowledged, that the appellant never delivered the deed of resignation to him the respondent in whose favour it was conceived, and that the respondent never gave the appellant any consideration for the same. That he knew nothing of any conditions upon which the said deed of resignation was delivered ; nor did he ever hear from the late Earl of Kinnoul, Sir Patrick Murray, or any other person  
whatever,

whatever, of any conditions upon which the said resignation was given; and had heard and verily believed that the conditions insisted upon by the appellant were referred to the oath of the said late Earl, and that he deponed *negative* thereto.

On the 24th of February 1721, the Court “found and declared, that the depositions did not prove the allegations made “made by the appellant, and therefore adhered to their former “interlocutors in the removing.” The appellant reclaimed, insisting that the respondent should be decerned to account for the losses the appellant sustained, by his being dispossessed of the premises; but the Court, on the 28th of February 1721, “adhered to their former interlocutor, without prejudice to the “appellant to raise, prosecute, and insist in any proper action “against the respondent for his intromission with the appellant’s “goods, or any damages done to the appellant by dispossessing “him or otherwise, as accords.”

The appeal was brought from “two interlocutory sentences “or decrees of the Lords of Session of the 28th of July, and 25th “of November 1720 and the affirmance thereof made the 24th “and 28th day of February 1721. (a)

Entered  
17 May  
1721.

#### *Heads of the Appellant's Argument.*

As no deed could divest the appellant of the right and title to his estate, or convey the same to the respondent, unless it had been delivered to him by the appellant (which the respondent never pretended to prove was done, but only would have it presumed to have been done, because it is now in his power,) the appellant having fully taken off that presumption, by the respondent's own acknowledgment upon oath, he conceives there can remain no further difficulty in this affair. And as the delivery of deeds is absolutely necessary for altering property, so both law and equity require a valuable consideration for the conveyance, (except where the deed itself bears to be made for love and favour;) and the respondent in his depositions has likewise most honourably acknowledged, that he never paid one sixpence for the estate, and that he knows not, that any thing was paid for it by any other person.

The appellant conceives it would be hard above measure to proceed to other presumptions, viz., that the said deed was delivered to the respondent's father, and the price of the estate paid by him for the respondent's use, without any further proof; for by that rule, if an obligee in a bond should execute a discharge *pro numeranda pecunia*, which should by any accident fall into the hands of a stranger, it would be in the power of that stranger, by giving that release to the obligor, to release him effectually, and put the obligor past relief, which justice cannot allow: The respondent therefore, before he can reap any benefit from the said deed, must prove not only the delivering of it to his

(a) These two last interlocutors are not mere affirmances of the two former, but on the merits; whereas the others are merely on the form of process: but so it stands in the journals.

father

father for his use, but likewise that his father paid the consideration thereof.

It was contended by the respondent, that as the appellant had acknowledged, that there might be, when the decree of removing was passed, some of the feu duties in arrear, so that the said decree, though only *en parte*, being grounded upon some real debt, though not equivalent to the value of the estate, was capable of being confirmed by the subsequent voluntary surrender; and thus that the said decree ought to be looked upon as the valuable consideration of the deed.

Two cyphers put together are of no greater value than any one of them was before; a void deed can never support a void decree. But these arrears of feu duties were inconsiderable, and tendered before the decree of removing.

*Heads of the Respondent's Argument.*

It is the constant practice of the Court of Session to grant commissions to examine parties upon oath, especially if out of the kingdom: and the respondent was at that time attending the service of Parliament, and was examined by a commissioner named by the appellant.

The respondent does indeed swear, that the deed was not delivered to him by the appellant, nor did he give any valuable consideration for the same; but then he adds the reason, that the whole was transacted by the late Earl of Kinnoul, his father; to him the deed was delivered, and no doubt there was a consideration given by him; and it is plain from the deposition of the late Earl of Kinnoul, that the same was delivered without any condition. And the appellant likewise brought an action against Sir Patrick Murray, insisting that the deed was deposited with him upon trust, not to be given up but upon performance of the conditions before mentioned; and Sir Patrick being examined upon oath, swore that the said deed was never deposited in his hands, and so there could be no trust reposed in him; and accordingly the Court, on the 24th of February 1721, affirmed the said Sir Patrick from the appellant's action.

The appellant likewise insisted that one Mercer, the respondent's agent in Scotland, might be examined how he came by the said deed; and whether he knew or had heard of any and what conditions, upon which the same had been deposited: and Mr. Mercer being examined swore, that the said deed was sent to him by the late Earl of Kinnoul to be made use of in the action of removing at the suit of the respondent against the appellant, and had heard that the same was delivered by the appellant to the said late earl; and that he never heard from the said late earl, or any other person, of any conditions, upon which the said deed was granted and deposited, except what was insisted upon by the appellant in his pleadings.

The respondent's father obtained a decree against the appellant in 1707, voiding his right; the appellant continued to possess the premises after that as a tenant at will, and paid the rent for the same;

same; the appellant in 1713 executed a renunciation of all the title and interest he had to these premises, and that renunciation was absolute without any condition; the appellant after that time has possessed as a tenant at will, and run greatly in arrear, which obliged the respondent to bring his action of removing against him, whereupon he recovered judgment; the respondent has been for several years kept in law suits by the appellant a pauper, and will in all events be a very great loser.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentences or decrees therein complained of be affirmed.* Judgment, 5 July 1721.

The Appellants' Case is signed by himself.

For Respondent. *Rob. Raymond. Will. Hamilton.*

*Ex parte*

David Falconer, of Newtown, Esq.	-	<i>Appellant;</i>	Cause 89.
The Principal and Masters of King's College, and the Provost, Baillies and Council of Aberdeen,	- - - -	<i>Respondents.</i>	

31st Jan. 1721-2.

*Presumption.*—Two deeds of mortification in favour of the same persons, but of different dates, and for different sums, found in the grantors repositories, did not both subsist.

A proof of his intention allowed by the instrumentary witnesses.

**T**HIS appeal was upon a point precisely similar to the other appeal at the instance of the same appellant, (No. 84 of this Collection). In addition to the two deeds in the former appeal recited, relative to the education of the scholars at the school of Conveth; the late Sir Alexander Falconer of Glenfarquhar, executed two others for maintaining and educating certain boys at the King's College of Aberdeen.

On the 3d of December 1712, Sir Alexander Falconer, by a deed upon the same recital with the first deed in the former appeal recited, left, mortified, and appointed 180*l.* Scots, payable yearly by his heirs out of certain lands, to the principal and masters of King's College Aberdeen, for educating and maintaining three boys at the rate of 60*l.* Scots each yearly, at the Philosophy College there; which boys should be sufficiently qualified, and be of the name of Falconer, in the first place, if any such there were, and in default of them, of any other boys duly qualified, that should be born or educated within the parish of Conveth; the first payment to be at the first term of Whitsunday, or Martinmas after his decease. The patrons and presenters were the same as in the former

former deed, namely his heirs and successors of the name of Falconer.

On the 7th of August 1716, Sir Alexander executed another deed upon the same recital as in the former, whereby he left and mortified 340*l.* Scots, payable out of the same lands, in the same manner and at the same terms with the former, to the Provost, Baillies and Council of Aberdeen, for maintaining at the said King's College, four boys of the name of Falconer, if any such there were, and in default of such, any other boys that should be born or educated within the parish, or at the school of Conveth; adding a clause not contained in the former, "that for the security of his heirs, the trustees should report the boys' discharges to the patrons and presenters within a year and a day after they should receive such year's allowance;" and a proviso, "that in case of variance between the patrons and the said magistrates, the first minister serving the cure for the time at the church of Aberdeen, and the minister of Conveth, were to decide and determine the same."

Neither of these deeds were delivered, but found, with the two others in the former appeal mentioned, in the repositories of the deceased at the time of his death. The respondents brought an action also against the appellant, the heir of Sir Alexander Falconer, deceased, for payment of the several sums contained in both the aforesaid deeds. The appellant made defences, and the Court, on the 29th of December 1719, "found both the mortifications made by the said Sir Alexander Falconer, of Glenfarquhar, in favour of the College of Aberdeen, to subsist."

The appellant reclaimed, and by his petition, amongst other things, prayed leave, as in the former case, to examine the instrumentary witnesses; but the Court, on the 15th of January 1721, "adhered to their former interlocutor, and refused the desire of the petition."

Entered  
31 October  
1721.

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session of the 29th of December 1719, and the affirmance thereof the 15th of January following."

Judgment.  
31 Jan.  
1721-2.

His argument was the same as in the former appeal.

*Whereas this day was appointed for bearing Counsel ex parte upon this petition and appeal, counsel appearing for the appellant, but no counsel for the respondents, and the appellant's counsel being heard and withdrawn: and the order and judgment of this House of the 14th of May last, on the appeal wherein the said David Falconer was appellant, and others were respondents, being read;*

*It is ordered and adjudged, that the said interlocutor of the 29th of December 1719, finding the two mortifications subsisted as two separate donatives, and the interlocutor of the 15th of January following, in affirmance thereof, be reversed: and it is further ordered and adjudged, that the appellant be at liberty to examine the instrumentary witnesses according to his petition to the Lords of Session for that purpose, referring to the Principal and Masters of King's College of Aberdeen, and the Provost, Baillies, and Council of the said City of Aberdeen, all de-*

*fences, competent in law, against the witnesses; and such further proceedings shall thereupon be had before the Lords of Session as to justice shall appertain.*

For Appellant, Rob. Raymond. Will. Hamilton.

John Allardice, Merchant in Campvere, Appellant; Case 90.  
Jane Smart, Widow and Executrix of the  
Appellant's Father, for herself and her  
Children, Respondent.

12th Feb. 1721-2.

*Provisions to Heirs and Children* — A special provision, in a marriage contract, of sums of money to be laid out on land or other good security, and also of conquest in lands, heritage, fishings, sums of money and others, to the *heirs* of the marriage, went to all the children, and not to the eldest son only.

A discharge of provisions granted by two children to their father, in consideration of a certain sum of money, paid to them, operated in his favour with regard to the remainder of their provisions, and not in favour of another child, who did not discharge.

*Fiar*. — A house, part of the conquest of a first marriage, is disposed to a person and his wife in conjunct fee and life-rent, and to the bairns of the marriage in fee, whom failing, to the heirs of the husband: the husband being *fiar* might settle the life-rent thereof on a second wife.

**B**Y contract of marriage in September 1683 between John Allardice, Merchant in Aberdeen, and Agnes Mercer his first wife, the appellant's father and mother both now deceased, the said John Allardice obliged himself to lay out 3000 merks Scots of his own money, together with the like sum he was to receive with his wife as her portion, upon land, or other good security, and to settle the same upon himself and the said Agnes Mercer, in conjunct fee and life-rent of the longest liver of them two, and the *heirs* to be lawfully procreate between them; whom failing, to the said John Allardice, his heirs, executors, and assignees. The contract contained this proviso, "that whatsoever lands, heritages, fishings, debts, sums of money and others, it shall happen either of the said parties to conquer, acquire, or succeed to, during the time of the said marriage, the *heirs* of the marriage shall succeed thereto *in integrum*."

In 1684, after the marriage had taken effect, John Allardice, the appellant's grandfather, by disposition, conveyed a house and its pertinents in Aberdeen, to the said John Allardice the father, and the said Agnes his spouse, in conjunct fee and life-rent to the longest liver of them two, and to the *bairns* lawfully begotten, or to be begotten, between them in fee; whom failing, to the heirs of John the father.

In 1700 the appellant's mother Agnes died, leaving issue the appellant and two daughters, the children of that first marriage. And at this time the father's free stock amounted to about 18000l. Scots,

Scots, besides the said house and pertinents in Aberdeen, valued in his books at 5210*l.* 16*s.* 9*d.* Scots, and all his household goods.

In January 1703 a contract of marriage was entered into between the appellant's father and the respondent Jane his second wife, by which he obliged himself to lay out 15000 merks of his own money, together with the sum of 7000 merks he was to receive as the said Jane's portion, upon land or other good security, and to settle the same upon himself and the said Jane in conjunct fee and life-rent; and to the children to be procreated of the marriage in fee, whom failing, to be the heirs, executors, and assignees of the husband; and he likewise obliged himself to infest the wife in the said house in Aberdeen in life-rent during her widowhood, in case she should survive him, which he obliged himself to warrant; but it was provided, that if the respondent should after his death be evicted thereout, she should be allowed 100*l.* Scots yearly for the rent of any other house she should think fit to take.

The appellant, being bred a merchant, was settled at Campvere, and his father gave him an advancement to a considerable amount. The two daughters of the first marriage were married in the father's life-time, and he gave each of them 4000 merks for their portions; and the daughters, by their contracts of marriage, discharged him of all provisions they could respectively claim by their mother's marriage contract or otherwise howsoever.

The appellant's father died in May 1718, leaving the respondent, his widow, and nine children, four sons and five daughters, of the second marriage. By his will, and a codicil thereto, he named his wife, the respondent Jane, sole executrix and universal legatee, with the burden of payment of 6000 merks to each of the four sons, and 4000 merks to each of the five daughters of the second marriage, and of some small legacies to the children of the first marriage. After his father's death, the appellant was cognosced heir to him in the aforesaid house and premises in Aberdeen, and infest. Besides that house and premises, and household goods, the deceased left about 39,535*l.* 1*s.* 6*d.* Scots of personal estate, including heirship moveables.

Soon after his father's death the appellant brought an action before the Court of Session against the respondent, for recovery of the 18,000*l.* Scots, being, as he stated, his father's stock at the dissolution of the first marriage, after deduction of the 8000 merks paid to his two sisters, and for recovery of the said house in Aberdeen, as being *conquest* of the first marriage, and provided to the heir thereof, and to have the same freed of the respondent's life-rent. The respondent made defences, and the matter being debated before the Lord Ordinary, who reported the same to the Court, their lordships, on the 16th of February 1720, "found that the heirs of the first marriage have right to all the "*conquest* during that marriage, in regard that at the time of "their mother's death, there was a sufficient fund to answer the "provisions in both contracts of marriage; and found that the "*provisions*



“ provisions in favour of the heirs of the first marriage  
 “ are to be understood in favour of the children of the marriage; of whom there being three in number, and two of  
 “ them having accepted of special fairs from the father, in  
 “ satisfaction of all they could claim by virtue of the said contract; therefore the appellant was only entitled to claim a  
 “ third share of these provisions; and found that the provisions  
 “ in the second contract of marriage are rational and suitable  
 “ provisions; and found that the relict has right to the life-rent  
 “ of the house provided to her by the contract of marriage with  
 “ her husband, who was *fiar*.”

The appellant reclaimed, and after answers for the respondent, and a hearing, the Court, on the 14th of July 1720, “ found  
 “ that two daughters of the first marriage having accepted of  
 “ provisions in their contracts of marriage, in satisfaction of all  
 “ that could fall to them by their mother's contract; which  
 “ provision being less than would have fallen to them as two  
 “ of three children of the first marriage, supposing that all the  
 “ children of that marriage were entitled to an equal share the  
 “ surplusplus of the two-thirds more than the provisions received  
 “ did not accresce to the son of the said marriage but was at the  
 “ father's free disposal; and before answer to the debate, whether  
 “ the provisions in the first contract in favour of the *heirs*  
 “ of that marriage, did entitle the son of that marriage to the succession thereof, exclusive of his two sisters, or if the three  
 “ children had an equal interest, ordained the records of retours  
 “ in the Chancery to be inspected, and that either party might  
 “ have access thereto, that it might appear, whether in the case of  
 “ provisions of sums of money, or other moveables in favour of  
 “ the heirs of a marriage, the eldest son of that marriage be not  
 “ usually and uniformly retoured heir of provision of the marriage, exclusive of daughters, or younger sons; or if usually, or  
 “ in any case, more sons and daughters of a marriage are found to  
 “ be retoured heirs of provision, by a virtue of a contract of marriage conceived in the terms aforesaid; and that the directors  
 “ of the Chancery should certify what appeared thereon; and  
 “ found that the clause of acquisition in the deceased's first contract comprehended goods, merchandize and gear; and also  
 “ found that the special sum provided to the children of the second marriage, is in the first place to be taken out of the acquisition  
 “ during that marriage, and that the same does affect the acquisition of the first, in case, and in so far only as the acquisition  
 “ of the second marriage falls short of satisfying the same.

The parties thereupon procured certificates from the deputy-director of Chancery, the first of which, obtained by the appellant, dated the 18th of July 1720, “ certified after inspection of the  
 “ register of retours he found that the eldest son of a marriage is usually and uniformly retoured as heir of provision of the  
 “ marriage, and that solely and no other person joined with him;  
 “ and that in no case did it occur therein, that more sons and  
 “ daughters of a marriage are retoured heirs of provision by virtue of a contract of marriage conceived in favour of the heirs  
 “ of

" of a marriage." The other obtained by the respondent, dated the 10th of January 1720-1, bore " that it did not occur in the registers of retours in Chancery, that any person is served heir of provision to sums of money or other moveables."

After production of these certificates and hearing the import of the word *heirs* debated, the Court on the 11th of January 1720-1, " found that the three children of the first marriage had an equal interest in the provisions contained in their mother's contract of marriage."

Entered,  
6 Nov.  
1741.

The appeal was brought from " several interlocutory sentences or decrees of the Lords of Session in Scotland, of the 16th of February, and 14th of July 1720, and of the 11th of January following."

#### *Heads of the Appellant's Argument.*

Though by the conception of the first contract, the heirs of the marriage are to succeed, which, when the subject of the succession is personal, may admit of the interpretation, that the provision was in favour of the children; yet still the father had the power of division, and as he has only given 4000 merks to each of the daughters, which they accepted, this was nothing but a dividing to each of them their share thereof, leaving the rest for his only son to succeed to, who, properly speaking, is the only heir of the marriage. Without this the said contract could never be fulfilled, whereby the succession to the conquest was provided to the heirs of the marriage *in integrum*. And this appears to have been the father's intention; since he took no assignment of any pretensions his daughters might have thereto, but gave them such a provision as he thought was suitable, with respect to the heir, and the extent of his fortune.

As to the house in Aberdeen, it is out of the question; the appellant's father, during his first marriage, having received a disposition from his father to him, in favour of himself and his wife, in conjunct fee and life-rent, and to the heirs of that marriage in fee; and the appellant, who alone could be heir of the marriage in lands, is accordingly cognosced heir and infest. It appears from the second contract of marriage, that both parties were diffident of the effect of the respondent's life-rent in the House; for though the appellant's father warranted it, yet he provided that in case of eviction, his heirs should only be liable in 100l. Scots *per annum*, for the rent of another house; which 100l. Scots ought to be taken out of the acquisition during the second marriage, rather than that the appellant, the heir of provision of the first marriage, and consequently a creditor, should be burdened therewith.

As to the father's stock, which amounted to 18,000l. Scots, at the dissolution of the first marriage, and to 20,000l. by the improvement thereof at the time of entering into the second marriage, the provision of 15,000 merks to the children of the second marriage, where the remainder included the special provision of 6000 merks in the first contract was invalid. But there neither

was nor could be a disposition nor assignation to any part of the deceased's stock at the time of entering into the second marriage; all the father could do was to oblige himself in the sum of 15,000 merks certain to the children of the second marriage, which must always be supposed to be made good out of any other separate estate, which he had, or might acquire without prejudice to his obligations in his first contract of marriage; the children of that marriage being properly creditors to the father. And the father, at his death, left an estate behind him sufficient to satisfy both his marriage contracts.

With regard to the interlocutor finding that the three children of the first marriage had an equal interest in the provisions contained in their mother's contract of marriage; the import and constant acceptation of the word *heirs*, in all deeds and writings, is always understood in favour of the eldest son; the only case wherein daughters are joint-heirs with the eldest son, in the personal estate, being where they are left unprovided by the father; which is no way applicable to this case. The uniform and usual practice of the records of retours in the Chancery in Scotland, evidently shews that the appellant only was capable of being retoured heir of provision in the contract of marriage, and he accordingly was so retoured. By this interlocutor the two daughters are entitled to an equal share of the whole provisions in the contract, both real and personal, which is directly contrary to the constant practice of the Scots law, and the universal custom of all degrees of persons, who always make a difference between the eldest, and younger sons, and daughters, even where provisions are to *children*; much more when to *heirs*. It is evident that this was the intention of the parties to the contract by their using simply the word *heirs*, the meaning of which they could not be ignorant of, and by the particular enumeration of the subjects provided to the heirs, viz. lands, heritages, fishings, &c.

The decree of the Court seems inconsistent with itself, since the Court of Session, by the first part of their interlocutor of the 16th of February 1720, find that the heirs of the first marriage have a right to the acquisition during that marriage, which the respondent has acquiesced in; and yet it is not alleged, that more than 8000 merks has been paid: and the provision to the appellant and his sisters by the codicil to their father's will comes far short of fulfilling the provisions in the first contract.

#### *Heads of the Respondent's Argument.*

The appellant has only a right to the third of what his father had at the dissolution of the first marriage, for the provision is in favour of *heirs to be lawfully procreate* between the father and mother; which can have no other meaning but the children of the marriage, and not of the heir male only, especially in cases where there is nothing but personal estate; and the rather since the 6000 merks agreed to be settled, is to go in the same way as the conquest, which plainly shews the import and meaning to have

been all the children, otherwise the younger children must have had nothing.

The father being bound to apply the conquest to the children of the first marriage, he might discharge that obligation the best way he could to the satisfaction of the parties; and as he was the debtor, whatever advantage is obtained by any transaction, must be to the use of the father; for he must be presumed rather to discharge himself, than to acquire any right to another. The two sisters were then entitled each of them to a third share, the father agrees with them for a less sum, and that must and can only be to the benefit of the father, who was their debtor; and this the rather since he had been at the expence of their education and marriages after his second marriage, which so far diminished the conquest of the second marriage, to which the respondent and her children had a right. Nor could there be any occasion for an assignment to the daughters shares, for the father being debtor, the release extinguished the debt; and the father was so far from intending any benefit to the appellant by these transactions, that he expressly declared in his settlements, that the sum of 10,000 merks, and fee of the house given to him, should be in full of all he could claim by his mother's contract of marriage, or any other way whatsoever.

With regard to the house in Aberdeen, the father was seised thereof in fee, he could have disposed of it to whom he pleased, and consequently the settlement thereof upon the respondent for her life only, cannot be called in question by the appellant; and the rather since the father has warranted the said house to the respondent, which warrantice descends to the appellant as his heir, and he is thereby bound to perform his father's deeds, and cannot call any of them in question; which case was determined by the House of Lords in 1718-19, in the case *Ayron v. Colville*.

The greatest part of the appellant's father's estate was gained during the second marriage: the fortune the respondent brought was more than twice as much as that of the appellant's mother; the appellant has had his education at the expence of his father, and has received much more, than any of the children of the second marriage, who must be educated, and whose provisions are much diminished by this expensive suit, and the provisions for the children of the second marriage are entirely rational.

After hearing counsel, *It is ordered and adjudged that the said petition and appeal be dismissed, and that the interlocutory sentences & decrees therein complained of be affirmed.*

For Appellant, *Rob. Raymond.*

*C. Talbot.*

For Respondent, *Sam. Mead.*

*Will. Hamilton.*

*Hog v. Lashley on appeal*  
7 May,  
1792.

In the important case of *Hog v. Lashley*, in the House of Lords 7 May 1792, a judgment of the Court of Session was affirmed, which found that renunciations by children of their claim of legitim operated in favour of a child who did not renounce, and not

No. 40. of  
this Collec-  
tion.

Judgment,  
12 Feb.  
1721-2.

not of the father. In the present case the House affirmed a contrary doctrine laid down with regard to the renunciations made by the children of the first marriage of their provisions by contract.

John Walker of Edinburgh, Merchant, - Appellant, Case 91.  
Robert Forrester of Edinburgh, Merchant,  
and William Macpherson of Edinburgh,  
Writer, - - - Respondents.

16th Feb. 1721-2.

*Bona fide consumption.*—An adjudication obtained in 1678, being found extinguished by receipts of the rents: in a subsequent action of count and reckoning, the Court having found the defence of *bona fides* sufficient to liberate till the date of the interlocutor, finding the adjudication compensated, and that the defenders were not put in *mala fide* by the citations and arrestments, the judgment is reversed, and they are ordered to account from the date of the arrestments used at commencement of the former action.

*Costs and Expenses.*—In an action relative to the commencement of *mala fides*, the Court having found that the same did not commence from the date of citation and arrestment, but from the date of the decree, and refused the pursuer his expences; on a reversal of the judgment, it is ordered that the Court tax, and ascertain the expences in that action, and that the same be then paid to the appellant.

**J**OHAN HANDYSIDE, who was the proprietor of several houses in the city of Edinburgh, being indebted to the respondents, or those under they claim, they obtained an adjudication of these houses for payment of the said debt, in December 1677; and by virtue thereof got into possession of the same in 1678. As stated by the appellant, the debt due to the respondents or those under whom they claim amounted to 277*l.* 15*s.* 6*d.*, and the yearly rents of the premises were 66*l.* 13*s.* 4*d.*

In 1713 Janet Handyside, the daughter of the said John Handyside, who had been abroad for several years, and who claimed right to the premises as heir to her father who had died many years before, conveyed all her right and title to the premises, and all her right of reversion, to the appellant; who was thereupon infest.

The appellant soon after brought his action before the Court of Session against the respondents, to have it declared, that the debt due to those under whom they claimed was satisfied and paid by their receipt of the rents and profits; and to have the respondents decreed to account for what they had received over and above the payment and satisfaction of their just demands. And in 1714, the appellant likewise arrested the rents in the hands of the tenants; but the respondents having found security to make the same forthcoming as accords, the arrestment was loosed, and the respondents were suffered to continue in possession till the event of the cause.

D d 3

Several

Several preliminary defences were now insisted on by the respondents, particularly that the legal was expired; but it appearing that there were several informalities in the adjudication, this defence, among others, was repelled.

The appellant now insisted, that the premises should be sequestrated; but the respondents offering to find security to make the rents forthcoming, the Court allowed them to continue in the possession upon finding security to be accountable for the rents thereof to those who had best right; but in case they did not find security, that then a sequestration should issue.

After various other proceedings the Court on the 13th November 1719, reduced the adjudication as null, in so far as concerned 4000 merks thereof, and as to 5000 the remainder of the sum claimed, found the same extinguished by intromissions; and by subsequent interlocutors in January and July 1720, found the respondent's right extinguished, and paid by the receipts of themselves, and those under whom they claimed, and therefore reduced the same, and preferred the appellant to the rents in time coming. So far the judgments were not appealed from.

Subject of  
the present  
appeal.

The appellant having extracted this decree, commenced an action, against the respondents, to compel them to account for, and pay to him the rents they had received pending the said action from 1713 to 1720. The appellants made two defences to this action; the first, that the decree extracted by the appellant having ordained the respondents' receipts of the rents to be imputed in satisfaction of their debts, they could not now be compelled to account in any other method; the appellant however having insisted, that the respondents were paid their debts before the said action commenced, the objection of the respondents was overruled by the court. They afterwards contended, that they possessed by virtue of a good title, a right that was thought irredeemable, and consequently that they were *bona fide* possessors; that a possessor in that view was not accountable for any rents or profits he might receive out of the premises in question, even though another person should be afterwards decreed to have a better right; and that he was only to account from the time, such other right was found preferable to his, upon the ground of the maxim, *bona fide possessor facit fructus perceptos et consumptos suos*. On the 28th of June 1721, the Lord Ordinary "sustained the defence of *bona fide* possession to liberate the respondents from accounting for "the rents preceeding the interlocutor 13th November 1719, by "which the said adjudication was found null, and repelled the "allegation of the respondent's being put in *mala fide* by the "appellants citations and arrestments." The appellant having reclaimed, the Court, by several interlocutors of the 14th and 21st of July, and 22d of November 1721, adhered to the interlocutor of the Lord Ordinary, and refused the appellant his expences in both actions.

Entered,  
8 Dec. 1781.

The appeal was brought from an "interlocutor of the Lord Ordinary of the 28th of June 1721, and from the interlocutory  
"of

“ of the Lords of Session of the 14th and 21st of July, and 22d of November following.”

*Heads of the Appellant's Argument.*

Though the law does indulge a *bona fide* possession against repetition of the rents, yet to that is required a well-grounded opinion and belief, that what a man possesses is his own, and no other person's. But so soon as he begins to doubt of his right he falls into a *mala fides*, and ought no longer to retain his possession. But the plea of *bona fides* cannot avail the respondents in the present case, since they knew they possessed by a redeemable right, and since they also knew that they had received five times more than paid their debt, before commencement of the action. When that was once begun, and the rents were attached in the tenant's hands, and the respondents had given security to account for the rents to such person as should be found to have right, there cannot be any, the least pretence for a *bona fide* possession.

The appellant has prevailed in every step of the proceeding, and had 18 interlocutors in his favour; and since the respondents have by their affected delays prolonged this action for seven years, and continued in possession of the premises for that time, and pretend not to account for the rents, the appellant humbly hopes also to have his expences allowed.

*Heads of the Respondents' Argument.*

The respondents had no reason to doubt their title to be an absolute right to the property of the premises in question, since the adjudications under which they claimed, not being paid off within the time limited by law for that purpose, become absolute rights, and they were only declared redeemable upon some informalities, which the respondents did not, nor could discover, and the appellant is so sensible, that they were all the time *bona fide* possessors, that he himself demands no account *prior* to the action. A citation or commencing of an action is no argument to take away *bona fide* possession, because till judgment be given, the title of the possessors is good, especially in a case where it is doubtful which of the parties had the best right, or where the title of the possessors was evidently a preferable right, and so sustained by the Court till the very date of the interlocutor finding their right extinguished by their receipt of the rents. And this has been the uninterrupted practice of the Court, in all cases, as can be vouched by decisions.

Though the appellant has prevailed in the action reducing the respondents' title as being extinguished by payment, yet he did not prevail in the action relative to the arrestments. On the contrary he never insisted thereon, nor obtained any judgment upon them; and the Court by an interlocutor of 6th July 1715, not appealed from, found the tenants *in tuto* to pay their rents notwithstanding of the arrestments, and discharged him from laying on any other arrestments, and that because he had not at that time established his title, nor for some years after. An arrestment is a very

improper way to make a person in *mala fide*, since by that very thing he owns the right to the rents to be in another person, and found his title to those rents upon the foot of another claim, not as proprietor but as creditor.

The respondents apprehend that they can in no view be liable to the appellant for costs and expences, in regard the appellant's right laboured under so many apparent imperfections, that without the aid of the Court the same could not be supplied; and the rather since at the appellant's own desire a commission was granted for examining witnesses to supply such defects, which occasioned a great expence to the respondents. There is no interlocutor of the Court of Session in the first process, which refuses expences to the appellant appealed from. And in the summons, which is the foundation of the second process, the appellant does not so much as pray to be allowed expences of the former process. The appellant indeed in the prayer of one of his petitions, craves an allowance for the expences of that process: but the same could with no shew of reason be granted, in regard all the interlocutors of that process are in favour of the respondents, nor can any instances be given where the Court has given expences in causes of a similar nature.

Judgment,  
16 Feb.  
1721-2

After hearing counsel, *It is ordered an adjudged, that so much of the interlocutor of the said Lord Ordinary of the 28th of June 1721, and of the interlocutors of the Court of the 14th and 21st of July and 22d of November following, whereby the defence of bona fide possession to liberate the respondents from accounting for the rents preceding the interlocutor of the 13th of November 1719, is sustained, and the allegation of the respondents being put in mala fide by the appellant's citations or arrestments is repelled, be reversed: And it is further ordered that the respondents account for, and pay to the appellant the rents and profits of the estate in question, intronitted with by them since the time of the arrestments at the instance of the appellant in July 1714, and that such parts of the said interlocutors whereby the appellant is denied his costs, so far as concerns the costs of the former suit be affirmed, and so far as concerns the costs of this last suit, be reversed. And it is hereby further ordered, that the said Lords of Session do forthwith tax, and ascertain the appellant's costs of the said last suit; and that the said last costs when so taxed and ascertained be immediately paid by the respondents to the appellant.*

For Appellant, Sam. Mead. Will. Hamilton.  
For Respondents, C. Talbot.



John Arratt, Esq,  
John Wilson of Baikie.

*Appellant* ; Case 92.  
*Respondent.*

21 Feb. 1721-2.

*Appeal.*—In an action of declarator of trust an interlocutor is pronounced, holding a defender as confessed upon an account of charge and discharge, given in by the pursuer, and he is ordered to denude. Afterwards upon the defender's application, the Court allowed him ten days longer to give in his accounts, but before the expiration of these ten days, he brings his appeal against certain interlocutors, and amongst others, against the interlocutors holding him as confessed; all which are specially affirmed by the House of Peers. After the determination of the first appeal, the defender applied to the Court to have liberty to give in his accounts in ten days, as allowed by the interlocutor before the appeal: but it was found that his right was extinguished, and that he must denude in terms of the decree affirmed by the House of Lords.

**A**FTER the determination of the former appeal, No. 52. of this Collection, the parties returned to the Court of Session, and a new litigation took place between them relative to the judgment of the House of Lords. In detailing this litigation, it is necessary to recapitulate some of the steps taken previous to the former appeal.

The Court, by interlocutor on the 9th of July 1717, " Found that the disposition executed by the respondent to the appellant of the estate of Baikie, was redeemable by payment of the sums resting due to the appellant after deduction of his intromissions, and ordained him to continue in the possession of the said estate until it were instructed, that he was paid, and remitted to the Lord Ordinary to proceed accordingly." The Lord Ordinary, when the cause was called before him, on the 23d of July 1717, " Ordered the appellant to give in an account of charge and discharge of his intromissions with the said estate in terms of the act of federunt about accounts and reckonings, and an account of what was truly paid by him, in acquiring the rights upon the said estate, as also of his necessary charges, and the vouchers thereof by Tuesday then next." This term was afterwards at different times enlarged; and the respondent in the mean time gave in an account of the appellant's intromissions and disbursements, making the balance due to the respondent 81*l*, 11*s*. 4*d*. Scots. The appellant having still craved further time, the Lord Ordinary on the 13th of November 1717, gave him till the Tuesday following, " with certification that if he failed, he should be found liable to the penalty in the act of federunt." The cause afterwards coming to a hearing, upon the 21st of November 1717 the Lord Ordinary pronounced the following interlocutor: " In regard the appellant has failed to give in his accounts, and that the respondent has given in an account of charge and discharge signed by him upon oath in the terms of the act of federunt, holds the appellant as confessed upon the said account given in by the respondent, and finds

" finds that by the said account the appellant was paid off all his rights on the said estate; and therefore decerns the appellant to denude himself thereof in favour of the respondent, and declares in terms of the respondent's libel, and also decerns the appellant to pay to the respondent 81*l.* 11*s.* 4*d.* Scots, being the balance of the said account."

The appellant having reclaimed, their lordships "*allowed him ten days longer to give in his accounts.*" Instead of giving in his accounts, however, he brought his appeal to the House of Lords, against sundry interlocutors, and particularly against the said interlocutor of the 21st of November 1717, whereby he was held as confessed upon the account given in by the respondent. And all the interlocutors appealed from (as stated in the former appeal) were, on the 23d of March 1718-19, affirmed, with 40*l.* costs to the respondent.

The respondent afterwards made application to the Court of Session to put the said judgment in force against the appellant, by compelling him to denude himself of the said estate in favour of the respondent, pursuant to the said interlocutor of the 21st of November 1717, and for payment of the 81*l.* 11*s.* 4*d.* Scots, the balance of the account whereon he was held confessed; and the appellant contending that he was still at liberty to give in an account of charge and discharge, the Court on the 9th of July 1719 " Found the appellant's right to be extinguished, and that he must denude in the terms of the decree affirmed by the House of Lords, reserving action to the said appellant for any articles that were not brought into the said account." And to this interlocutor the Court adhered on the 11th of July and 16th of September following.

The appeal was brought from " an interlocutor of the Lords of Session of the 9th of July 1719, and the affirmances thereof the 11th of the same month and 16th of September following."

#### *Heads of the Appellant's Argument.*

Though the interlocutor of the 21st of November 1717, came in the recital of the proceedings to be mentioned in the said petition and appeal, yet the same was not insisted on in the case, nor pleaded at the bar; as the appellant well knew that interlocutors of that kind, which are pronounced by default, are easily altered and relieved against by the Judges themselves. In the present case, that interlocutor had been set aside by the Court, and ten days longer time allowed to the appellant to give in his vouchers, within which ten days the order on the appeal having been served upon the respondent, the Court could have no further proceedings till the appeal were discussed. After that the appellant expected that he had the same liberty to apply to the Court, and give in his vouchers, as he had at the time when the order was served: and he conceived, that it never was the intention of the House of Lords to oblige him to re-convey the estate without being paid the money he had really laid out, especially since some of the interlocutors mentioned in the former appeal, and equally affirmed

with

Entered,  
20 Jan.  
1720-1.

with that of the 21<sup>st</sup> of November 1717, have decreed that he should be paid his just debts.

### *Heads of the Respondent's Argument.*

The appellant has kept the respondent out of the possession of his estate for above ten years, and put him to a tedious and expensive law-suit, to the almost utter ruin of the respondent and his family. The appellant has still more than two years rent of the estate remaining in his hands unaccounted for; and if there were any articles not brought into the account, he has his remedy against the respondeht, by virtue of the reservation in the interlocutors now appealed from.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutor of the Lords of Session and the affirmances thereof be affirmed.*

For Appellant,      *Sam. Mead.*      *Will. Hamilton.*  
For Respondent,      *Rob. Raymond.*

In the appeal cases in this cause, the whole proceedings stated in the former cause, No. 52, of this collection, are recapitulated.

**Charlotte Marchioness Dowager of Annandale, *Appellant*; Case 93.**  
**James Marquis of Annandale. - *Respondent*.**

15th Dec. 1722.

**Provisions to heirs and children—Husband and wife.**—In a contract of marriage with a first wife, a person obliges himself to settle his estate on the heirs of the marriage; by a procuratory of resignation, executed in same terms, he reserved power to grant provisions to a second wife and younger children, on which infestment followed; and by another deed he afterwards restricted his right of granting provisions to a second wife, and children, to the extent of 100,000*l.* Scots: After a second marriage, he grants a bond to a second wife for an annuity or jointure of 100*l.* sterling; but made no provisions for children of the second marriage. This second wife is a question with the heir of the first marriage, is declared to have the right to her jointure, till she drew thereout the sum of 100,000*l.* Scots.

**Registration.**—A deed restricting an unlimited power of granting provisions to a second wife and younger children, which unlimited power was contained in indentments upon record, is found valid, though not registered, in a question between the heir and a second wife.

**B**y the marriage-contract in 1686, between William Marquis of Annandale, and Sophia Fairholme his first wife, in consideration of the marriage, and of 80,000 merks Scots paid down for the lady's portion, the Marquis obliged himself to settle all the lands he was then seised or possessed of, in favour of himself, and the heirs male of the marriage, and that the said heirs male should succeed to him in his honours and dignities, and in all and whatsoever

soever lands and others then any way appertaining to him. The jointure thereby settled upon the said Sophia was 8000 merks Scots per annum. In terms of the said marriage-contract the Marquis on the 25th of February 1690, executed a procuratory for resigning all his lands, therein particularly mentioned, to have new infeftments thereof granted to himself in life-rent, and to the respondent his eldest son, then an infant of tender years, in fee, under several provisos and conditions; particularly, that the same should be subject to the jointure settled upon the then Marchioness, or any additional life-rent provision he should give her, or any other wife he should happen to marry; and that the same should also be subject to all the just debts then owing by him, and to such provisions as he was then obliged, or should be thereafter obliged to pay to his younger children, of that or any other subsequent marriage; and he reserved to himself a power of charging the premises with debts to the amount of 40,000 merks Scots. Upon this procuratory a crown-charter was obtained, and infeftment taken thereon.

On the 15th of March 1715, the Marquis executed a deed, reciting the settlement of 1690, and the clause therein contained, reserving power to make provisions for the wives and children of future marriages, which proceeds thus: "And now seeing we are resolved further to explain the clause of provision above narrated, and to signify our pleasure thereanent; and to determine how far we think fit to extend the aforesaid reserved faculty of providing the haill other children of this present marriage, or for the provision of haill other children and wives of subsequent marriages: Therefore," &c. "Wit ye us to be bound, like as we by these presents bind us, not to exercise the aforesaid faculty to a further extent than 100,000*l.* Scots, to haill other children procreate, or to be procreate of my body in this present marriage, or for the haill provisions in favour of the haill children or wives of subsequent marriages; to which sum of 100,000*l.* money aforesaid, the indefinite faculty above narrated, of providing the haill other children aforesaid is expressly hereby restricted." The deed of restriction was not registered, but was kept by the Marquis in his own custody.

Marchioness Sophia died in December 1716, and in 1718 the said late Marquis intermarried with the appellant, the daughter of Mr. Vanden Bempde, his second wife. No contract or settlement was made upon this second marriage, but the late Marquis on the 20th of February 1719, granted an heritable bond of provision to the appellant for a life-rent of 1000*l.* sterling *per annum*, issuing out of his estates, during her life; upon this she was infeft on the 6th of March following, and her seisin duly registered.

The late Marquis dying upon the 14th of January 1721, and the respondent his eldest son and heir refusing to pay the said life-rent of 1000*l.* sterling *per annum* to the appellant, she brought a process before the Court of Session for pointing the ground. The respondent and his tenants appeared, and made defences; and the Court on the 15th of February 1722, "Found, that the late Mar-

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“ quis of Annandale by his contract of marriage did oblige himself, that the heir male of the marriage should succeed to him in his honours and estate, and that the faculty reserved to the late Marquis in the procuratory of resignation 1690, and in the charter and seisin following thereupon, whereby he reserved power to burthen his heir with any life-rent provision to a lady whom he might afterwards happen to marry, did not import an unlimited power to burthen the heir with an unlimited life-rent at his pleasure; but that the same was qualified by his contract of marriage; and that by the said contract and reserved faculty he had only power to burthen the respondent, the heir of provision, with competent life-rent provisions in favour of the appellant his second lady, suitable to the circumstances of his family and estate at the time, and remit it to the Lord Ordinary to proceed accordingly.”

The appellant reclaimed against this interlocutor, praying that at least her life-rent provision should subsist till she drew out of it the sum of 100,000*l.* Scots: but after answers for the respondent, the Court on the 27th of February 1722, “ Adhered to their former interlocutor, and found, that by the deed of restriction made by the late Marquis in 1715, the faculty reserved by him in the writ of tailzie made by him in the year 1690, was in all events restricted to 100,000*l.* Scots for provisions to a second lady and younger children, and that the appellant’s interest herein cannot exceed the annual rent of the said sum of 100,000*l.* Scots.”

The appellant brought this interlocutor under review, and stated that as the restriction was not to be discovered upon the record, it could have no effect against her: the respondent made answers, and the Court on the 26th of June 1722 “ Adhered to their former interlocutor, and found that the aforesaid restriction, though not registered, is effectual both against the Marchioness and her children.”

The appeal was brought from “ several interlocutors and decrees of the Lords of Session of the 15th and 27th of February, and 26th of June 1722.”

Entered  
12 Oct.  
1722.

#### *Heads of the Appellant’s Argument.*

The late Marquis was no further bound by the contract of marriage of 1686, than that the estate should descend to the respondent as his heir, and that he should not institute another heir, or dispose of that estate to a third party, without an onerous consideration. But the late Marquis still had an absolute power of charging the estate with debts at pleasure, and might have sold the whole or any part of it for a valuable consideration; and the respondent, the heir of that contract, would have been obliged to fulfil and make good, not only all deeds done for valuable considerations, but also all rational deeds done by the Marquis touching that estate. The jointure given to the appellant was no fraudulent deed, nor done with intention to disappoint the respondent’s succession, but was rational and suitable to the Marquis’s quality; and marriage has always been looked upon in law as a valuable

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is an express law for recording sasines, &c., which particularly recites all deeds thereby appointed to be recorded, and appoints a record for that purpose; but there is no order of law for recording discharges or restrictions of personal faculties and powers.

But whatever claim a creditor for a valuable consideration might pretend, in the present case there can be no such question; here there was no settlement before marriage, the appellant took her hazard of the legal provisions; nor was there any portion paid to entitle her to be a purchaser for a valuable consideration, and she can claim no more than what the Marquis could voluntarily give: he could certainly never extend that provision beyond the powers he had by law, and the limits he had given to himself in the explanatory or restricting deed.

It is plain from the words of this deed, 1715, that the Marquis meant to extend the restriction to provisions to wives, as well as to children. In several places of it the Marquis mentions his design to restrict his power of providing for younger children, and wives of subsequent marriages to 100,000*l.* Scots.

By the uniform practice and construction of the law of Scotland, where any sum of money is set aside, or appointed for a wife and children, the wife's interest in that sum is different from the children's: the interest of the children extends to the fee; and the interest of the wife to the life-rent only; so that the provision in the deed of restriction 1715, has the same effect in law, as if the power reserved to the late Marquis had been in express words to provide the life-rent or interest of 100,000*l.* Scots to the wife, and the fee of that sum to the children. If a person in the disposition of his estate to his eldest son, reserve a faculty in case of a future marriage, to settle one of the baronies disposed for the provision of a wife and children of a subsequent marriage, no one will imagine, that this reservation would enable him to dispose of the fee of such barony to the wife, or to give her any other interest in it than a life-rent; and the power reserved to the late Marquis by the deed 1690, to make provision for a subsequent wife, was only by a life-rent, though not restrained to a certain sum; and the deed 1715, only restrains such powers reserved by the deed 1690, to a certain sum, but does not change or alter the nature of them.

Judgment,  
15 Dec.  
1722.

After hearing counsel, *It is ordered and adjudged that the said interlocutor of the 15th of February, complained of in the said appeal, and so much of the said two other interlocutors as affirm the first interlocutor be reversed: And it is further ordered and adjudged, that so much of the interlocutor of the 26th of June, whereby the Lords of Session, found that by the said deed of restriction made by the said Marquis of Annandale, the 15th of March 1715, though not registered it effectual against the appellant and her children be affirmed: And it is further ordered and adjudged, that so much of the interlocutor of the 27th of February, whereby the Lords of Session found, "that by the said deed of restriction made by the said Marquis in 1715, the faculty reserved by him in the writ of tailzie, made by him in the year 1690, was in all events restricted to 100,000*l.* Scots, for provisions*

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" to a second lady and younger children, and that the appellant's interest therein, cannot exceed the annual rent of 100,000l. Scots" be reversed: And it is hereby further ordered and adjudged, that the appellant's life rent of 1000l. per annum, is a charge on the estate, until she has drawn thereout 100,000l. Scots with interest thereof, from the decease of the said late Marquis, and no longer, and that the said 1000l. per annum, be accordingly paid to the appellant, at the respective terms appointed for payment thereof, in the bond of provision, with interest to be computed for such part thereof, as is now in arrear from the times the same ought to have been paid, until the same shall be paid: And it is further ordered that the Lords of Session do direct proper diligences, both personal and real for the appellant's recovery of the arrears of the said annuity, and all future payments thereof yearly, and termly as the same shall fall due, together with the interest for the before-mentioned arrears, from the times at which the same became due, until the same shall be satisfied.

For Appellant, Rob. Raymond. Ro. Dundas.

For Respondent, Dun. Forbes. C. Talbot. Will. Hamilton.

Charlotta Marchioness Dowager of Annandale, and the Lords George, and John Johnston, her Children, Infants, by their Mother and Guardian,  
James Marquis of Annandale.

Appellants;  
Respondent.

21st Dec. 1722.

*Provisions to heirs and children.—Presumption of revocation.—*A father executes a deed in favour of his heir giving him a locality over part of his estate, and assigning the tacks to him, with warrandice from fact and deed, and a power of revocation by writ under the grantor's hand: The first year the father marked the rents of the allocated lands, in his rentals, as to be paid to the son; the next year this was not done, and the factor received a letter to pay no more of the son's bills. The allocation was not thereby revoked.—But a deed of revocation found in the grantor's repositories after his death, though not published or recorded, revoked the allocation.

**W**ILLIAM Marquis of Annandale, in 1686, married Sophia, the daughter and only child of John Fairholme, Esq. who was possessed of a large estate, which afterwards came to the said marquis. By the contract of marriage, the said marquis in consideration thereof, and of 80,000 merks Scots, paid down for the lady's portion, bound himself to resign his estates for new indentments thereof, in favour of himself and the heirs male of that marriage; and accordingly he afterwards executed a deed of entail on the 25th of February 1690, resigning and settling all his lands and estates therein particularly mentioned to himself in life-rent, and to the respondent his eldest son of the said marriage

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Case 94.

in fee, reserving to himself a power *inter alia* to charge the estate with debts to the amount of 40,000 merks Scots, with what portions he thought fit to younger children, and with power also of giving what jointure he pleased to a second lady.

On the 7th of March 1715, the late marquis by his deed reciting the said settlements and that in consideration of the dutiful respect testified by the respondent, and for his convenient support, he did out of his good pleasure renounce and assign in his favour a part of the said estate, of above 500*l.* sterling per annum, value, assigned the tacks thereof to the respondent, and empowered him to receive the profits thereof at Whitsunday then next, for the half year preceding, and yearly thereafter with an express clause in these words: "and we do hereby declare that these presents are to continue till we *recol the same by writ under our hand.*" The warrandice run in these words, "this renunciation and assignation we oblige ourselves to warrant from our own act and deed, done or to be done in prejudice thereof, except the before-mentioned tacks."

In consequence of this deed or allocation, that part of the estate appropriated to the respondent, was not inserted in the rental signed by the marquis, and delivered to his factor, (as usual,) as a rule for levying the rents, for the year 1715; and the respondent accordingly had the profits for a year and a half, ending at Whitsunday 1716. From thence however till Martinmas 1720, soon after which the late marquis died in January 1721, the rents and profits of the allocated lands were received on his own account. And in the rental delivered to Henderson the factor after Martinmas 1716, signed by the late marquis, the allocated lands were again inserted, the profits to be received for the use of the marquis.

The marquis afterwards wrote a letter to Henderson the factor, which the appellants state to have been written from London, the 14th of February 1717, and received by Henderson some time in the same month or in March thereafter, but which the respondent states to have been without date; this letter taking notice that *his son* had drawn bills on Henderson for 250*l.*, discharged Henderson from accepting or paying them. And after the death of the marquis, there was found in his cabinet a deed, bearing date the 12th of May 1718, reciting the said deed of allocation, and that the marquis had formerly by letters to his factors and chamberlains recalled and stopt the precepts which he had given for payment of the said allocation, and he not only ratified what he had so done, but did thereby revoke the said settlement, and any other settlement or allocation granted to the respondent and declared the same void and null. With regard to this revocation, it was sworn by Henderson the factor, that the last time, the late marquis was in Scotland, he told Henderson, that he had made a written revocation of the allocation, and that a paper which he held in his hand was the revocation, though it was not then read to, or by Henderson.



The late marquis by his last will and testament left his personal estate subject to the payment of his debts contracted since the settlement of his real estate in 1690, for which the respondent was not bound, to the Marchioness Dowager, his second lady, whom he named executrix, in trust for his children of that marriage, (which Marchioness Dowager and her children are the appellants in this cause.) This was all the provision which these two sons had from their father, and which, after deducting the debts affecting the same, amounted to a very moderate sum. This will was proved in Doctors Commons, after a caveat and contest on the part of the respondent, and he in the mean time confirmed himself executor to his father in Scotland, and took possession of the personal estate in that country.

The appellants having brought an action against him to denude him of the executry, he commenced a process before the Commissary Court of Edinburgh, concluding that he should be found a creditor upon the personal estate for the yearly value of the lands which had been allocated to him, for the year 1716, and thereafter till the day of his father's death. The commissaries on the 4th of December 1721, "found that the allocation was not recalled by any writ under the marquis's hand, and decreed *cognitionis causa*, conform to the libel." And on the 23d of January thereafter the commissaries "repelled the defence founded on the revocation 12th May 1718, in respect of the latency of that deed, during the late marquis's lifetime, whereby the respondent could not apply for a legal modification in place of the allocation."

The appellants brought a bill of advocacy before the Court of Session, and their Lordships on the 17th of July 1722, "found that the allocation by the late marquis in favour of the respondent was revocable only by a deed under the deceased marquis's hand; and that neither the putting the allocated lands in the rentals given to Mr. Henderson, and his accounting to the late marquis for the same, nor the letter to the said Henderson, were sufficient to infer a revocation, and that the deed of revocation lying in the late marquis's cabinet, at his decease, without publication or intimation, cannot take effect from the date thereof; and that the late marquis's saying to Henderson he had made a revocation, which he said he then held in his hand, but did not read to Henderson, nor allow him to read, (as mentioned in Henderson's oath,) was not sufficient to interrupt the respondent's right to the rents of his locality."

The appeal was brought from "a decree of the Lords of Session of the 17th of July 1722."

Entered,  
12 Oct.  
1722.

#### *Head of the Appellants' Argument.*

The allocation was, by the express words of it, revocable at pleasure; and whatever motives it was founded on, it was granted and accepted on that condition on which alone it could subsist. Nor in fact was there any onerous consideration for it; the late Marquis having made other distinct concessions to the respondent,

when he enlarged his father's faculty of charging the estate with debts. The only consideration was that of respect and duty then paid by the respondent to his father, as the deed itself mentions: and the respondent's withdrawing that duty and respect, and going beyond sea without his father's knowledge, were the motives of recalling the allowance, as is set forth in the deed of revocation.

The power of revocation plainly extended to the aliment itself, and not to a power only of altering the lands out of which it was to be levied, as was contended by the respondent: and the warrantice cannot alter the case, but must follow the nature of the deed. Nor could there be any reason for a *declarator* in this case, which would have been necessary only if the respondent had fallen from the aliment by any penal irritancy.

The rentals for the year 1716, and subsequent years, all signed by the late marquis, whereby the rents of the allocate lands are directed to be received and applied to the marquis's use, and the late marquis's letter to Henderson forbidding him to pay the respondent's bills, are a sufficient revocation of the allocation. In the worst view, it was revoked by the deed of May 1718; and there was no occasion for publishing such revocation, or giving notice of it to the respondent. But the respondent had sufficient notice thereof, by having the payment of his bills stopt, after which he never drew fixpence out of the estate, nor ever attempted it: which also shews the respondent's opinion of and acquiescence in the revocation.

The late marquis considered the allocation as fully revoked, as is evident in this, that his personal estate is the only subject he appropriates for the provision of his younger children, which he must have known to be ineffectual, if the arrears of this aliment, or any part thereof, were a burden on this subject; and he would doubtless in that case have exercised the power he had by the settlement of providing for the younger children out of his real estate.

#### *Heads of the Respondent's Argument.*

By the deed of 1715, the power of revocation is confined to be *by writ*, that is a deed, under the grantor's hand; and could not be revoked by implication. Though the late marquis's receiving the rents to his own use should amount to an implied revocation, it will be of no force in this case, as not answering the proviso in the deed.

Nor will the letter written to the factor, forbidding him to answer his son's bills out of his effects, amount to a revocation: for as this letter is without date, so it does not mention the respondent's name; and the late marquis had at that time another son of age, and the prohibition is only not to pay the bills out of *his effects*, that is, the grantor's, but did not relate to the rents belonging to the respondent. Besides, the factor being examined upon oath, swears, *that he never had any missive letters or written orders*, recalling the said allocation, or stopping payment thereof to the respondent;

respondent; nor did he know or suspect where any such might be.

The deed of revocation, now set up, was never published or heard of, nor any notice given thereof to the respondent, till after he had commenced his action; and it is acknowledged to have been found in the late marquis's strong box or scrutoir after his death, and therefore was an incomplete deed of no force, never delivered or executed so as to take effect.

The warrandice in the said deed of 1715 against the acts or deeds of the late marquis, shews plainly that the intention of the said power of revocation was only as to an allocation or commutation of the lands out of which the aliment issued, but not to revoke the aliment itself; for in that case the warrandice would take place, which is the last covenant in the deed, and consequently will controul whatever goes before it, and either does or seems to contradict it. And besides this, by the law of Scotland every proprietor of an estate, much more a nobleman, is obliged to aliment his eldest son, suitably to his estate and quality.

After hearing counsel, *It is ordered and adjudged, that so much of the said interlocutor complained of in the said appeal, whereby the Lords of Session found "the allocation by the late Marquis of Annandale in favour of the respondent was revocable only by a deed under the deceased marquis's hand; and that neither the putting the allocate lands in the rentals given to Mr. Henderson, and his accounting to the late marquis or his commissioners for the same; nor the letter to the said Henderson were sufficient to infer a revocation," be affirmed: And it is further ordered and adjudged, that the rest of the said interlocutor be reversed; and it is hereby further declared and adjudged, that the said deed of revocation bearing date the 12th day of May 1718 do take place from the date.*

Judgment,  
21 Dec.  
1722.

For Appellants,	Rob. Raymond.	Ro. Dundas.
For Respondent,	Dun. Forbes.	Will. Hamilton.



After to admit and receive him to the said ordinary place, accepting him as one of their number. This letter was presented to the Lords of Session, sitting in judgment on the 26th of the said month, and Mr. Haldane required to be admitted to trial in the ordinary form: but the court deferred proceeding thereon till the next day.

Upon the 27th of December, the dean and faculty of advocates put in their petition, setting forth that Mr. Haldane, immediately after his admission as an advocate, left the Court of Session, and went into the country to make interest for his election as a member of parliament: that for the three subsequent sessions he attended parliament constantly till the latter end of the year 1716, when he was appointed one of the commissioners of the forfeited estates: that from that time forward Mr. Haldane regularly attended the parliament whilst it sat, and during the intervals of parliament attended his office as commissioner of inquiry; and that office being kept at Edinburgh, he sometimes came into the Court of Session among his brethren the advocates; and on certain occasions not exceeding three or four times in the whole, appeared at the bar: and the petitioners thence suggested, that Mr. Haldane had not served as an advocate in the terms of the 19th article of the Union; and concluded, that he ought not to be found qualified to be an Ordinary Lord of Session. A petition to the same purpose was presented by the principal clerks of Session.

The Court thereupon ordered Mr. Haldane to give in a special condescendence of his service as an advocate in the College of Justice, since his admission in January 1715. This he accordingly did, and insisted, that he had been near seven years an advocate in the College of Justice, and had practised as such; except when his attendance in parliament called for his attendance there; and and he stated more particularly that he had attended locally at the bar, part of ten different Sessions, when he had practised. At that time the Session took up six months of the year, viz. the months of November, December, January, and February, as the winter Session, and the months of June and July, as the summer Session.

In answer to Mr. Haldane's condescendence, the dean and faculty of advocates presented a memorial, wherein they observed: 1st, That whereas there were 30 Session months in five years, it appeared by Mr. Haldane's own admission, that he had served no more than the half of that time. 2dly, That though he stated as *time of service*, the whole Session time that he remained in Scotland, yet in reality except 3 or 4 appearances, he did not serve at all during that space, having been employed in his office of Commissioner of Enquiry, the office hours of which were the same with the federunt hours, of the Lords of Session; and he very rarely gave himself the trouble to put on his gown. And 3dly, That as his accidental attendance on some few occasions did not come up to the *terms* of the 19th article of Union, so neither did it at all answer the *intention* thereof; because a lawyer whose attendance was interrupted, was not in the way of thereby gaining employment or experience in business.

On the 28th of December 1721, the Court pronounced the following interlocutor, "The Lords having considered the 19th article of the treaty of Union, his royal majesty's letter requiring the Lords effectually to try, and afterwards receive Mr. Patrick Haldane to the place of an Ordinary Lord of Session, with the condescendances given in to them for the said Mr. Patrick Haldane, and the several representations and petitions by the dean and faculty of advocates, and by the six principal clerks of Session; they find the facts contained in the two condescendances given in by the said Mr. Patrick Haldane, are not sufficient to make it appear that he is qualified to be an Ordinary Lord of Session, according to the 19th article of the Union."

On the 23d of January 1722, a representation was exhibited to the Court of Session by the appellant Robert Dundas, his majesty's advocate for Scotland, (said to be done by the king's special command,) insisting that they had no power to refuse his majesty's nomination, founded on the 19th article of the Union, and at same time a petition was presented for Mr. Haldane praying to be admitted to trial in common form. The Court of Session, in an address to the king, laid before his majesty the reasons why they apprehended that they had jurisdiction, and on the 26th of January 1722, "superceded to advise Mr. Haldane's petition until the competency of the Court of Session to judge of the qualification required by the 19th article of the Union be determined."

This objection to the competency of the Court having been waived by a letter directed to the Court of Session, from one of his majesty's principal secretaries of state; and answers having been put in to the petition of Mr. Haldane by the dean and faculty of advocates, the Court on the 8th of June 1722, "adhered to the interlocutor dated 28th December last 1721, and therefore find they cannot admit the petitioner to trial on his other qualifications required by law."

Entered,  
23 Oct.  
1722.

The appeal was brought from "several interlocutory sentences of the Lords of Session of the 28th of December 1721, the 26th of January following, and 8th of June 1722."

The respondent gave in answers, wherein they admit the several interlocutors appealed from to have been pronounced, but say, "That as these sentences are not acts of judgment or decrees, in questions of private right betwixt parties pleading in a civil court, but acts regarding the public policy of the nation, in execution of a trust reposed by divers statutes in the Court of Session for maintaining the regulations made for the better constitution of that court; they submit it to the judgment of this most honourable house, whether the appellants have properly brought their appeal, and whether in a case of this nature, where the respondent had no patrimonial or pecuniary interest their appearing to inform the Court of Session of facts material towards the determination of the question before them, did properly entitle the appellants to make them parties to the appeal."

The

Journal.  
6 Dec.  
1782.

The several proceedings out of the Journals in 1702, in the cause between Thomas Lord Wharton, and Robert Squire; and the order upon receiving the appeal of James Greenshields, clerk, the 25th of March 1710 (a), being read; it was resolved that counsel on both sides should be heard upon this point only, whether the matter complained of by the appellants be proper to be determined by the house of Lords upon appeal.

*On this Preliminary Point (b).—Argument of the Appellants.*

The appellants humbly apprehend their appeal is regularly and properly brought; for Mr. Haldane received from the crown a grant of the office of one of the judges of the Court of Session, and insisted in the regular way before that court to have his right ascertained, and he admitted to his office; and the respondents appeared in Court, and objected to his right, on pretence that the grant in his favour was hurtful to a right and privilege established in them by the 19th article of the Union, and prayed judgment upon their right, and against the right of Mr. Haldane. And accordingly the Court of Session, after considering the petition of the respondents, the answer for Mr. Haldane, and reply for the respondents, given in, in form of memorials, pronounced the interlocutor first recited to the hurt of the appellants' right.

His majesty's advocate, and Mr. Haldane having severally applied for a review of that judgment, the respondents continued to appear as parties, and put in their formal answers, in the same manner as is practised in every other cause; in which they insisted to have the judgment affirmed, which the court did accordingly.

From the face of the proceedings it appears, that this was a regular cause, wherein there were parties litigating upon their different rights and titles, and praying judgment upon them; and that very formal, though erroneous, judgments were given upon the claims, answers and replies of the several parties, which have been entered on record in the same way with other judgments: In consequence of which that decree, extracted in due form, was allowed by the court to be taken out, and now lies before the House of Lords.

The judgments complained of are given by the Court of Session, upon a point of right depending on an explication of an article of the Union, the jurisdiction of which Court of Session, in all cases, is now subordinate to the House of Lords, and consequently their decrees liable to be reviewed upon appeal.

By the express words of the claim of right as ascertained by the convention of estates, at the Revolution, it is declared to be the right and privilege of the subjects, to protest for remeedy of law (which is the same with appealing) against sentences pronounced by the Lords of Session without distinction: and the decrees complained of are sentences of that Court, as the answer of the respondents sets forth.

(a) No. 6 of this Collection.

(b) On this point, there is a separate case for the appellants.

If the Lords of Session under a specious pretence of an incapacity of the person appointed by the crown to be a judge of that court, may refuse such person; and if such refusal should be final and conclusive, the undoubted right of the crown to appoint such officer will be divested out of the crown, and vested absolutely in the Lords of Session: and the person who may obtain such nomination from the crown, though every way qualified to execute that office, if, through a mistaken judgment of the Lords of Session, he should be represented otherwise, will be deprived of a right, which by law he is justly entitled to, without any manner of relief *a*).

Journal,  
29 Dec.  
1782.

After hearing counsel, for two successive days, (on the 17th and 18th of December) the several proceedings out of the journal upon the petition and appeal of James Greenfields, clerk, being read: and after long debate, a motion was made, and the question was put, "That it is the opinion of this House that the matter complained of in the petition of Mr. Patrick Haldane" and Robert Dundas, Esq; is proper to be determined by this "House upon an appeal;" it was resolved in the affirmative.

*On the Merits—Heads of the Appellants' Argument.*

Mr. Haldane was admitted to serve as an advocate near seven years before he was named to be an Ordinary Lord of Session. The 19th article of the Union requires no local attendance at any bar, far less at the bar of the Court of Session, (which is but one court of several that belong to the college of justice), but requires only serving as an advocate in that body of lawyers called the college of justice for the space of five years, &c. This means that the person named to be an Ordinary Lord of Session, shall for the space of five years before such nomination have borne the character of an advocate, without having followed any other employment inconsistent with that character, and discharged the functions of an advocate from time to time as occasions might offer. All this Mr. Haldane has done; for he was not only admitted advocate near seven years before he was named to be an Ordinary Lord of Session, but had practised as occasion offered, actually in the several courts, except when he was called to attend his duty in parliament: and it is hoped that serving in parliament is not inconsistent with serving as an advocate; and consequently that there is no reason for deducting the time of his serving in parliament from the account of the time he has served as an advocate.

According to the respondents' explication of the article of the Union, if an advocate had practised with the greatest assiduity for never so many years either before the Court of Exchequer, or the Court of Justiciary in Scotland, or part of the time at the bar of the House of Lords; and had even practised in the College of Justice, by chamber practice, in advising and settling pleadings, &c. which were to come and did come before the Court of Session, but had not thought fit to attend at the particular bar of

(a) No case or argument appears for the respondents upon this point.



that court; such person could not be named an Ordinary Lord of Session, which appears to be very unreasonable. And though it be admitted, that the reason of requiring this qualification of serving five years as an advocate before a person could be named an Ordinary Lord of Session, was that he might acquire due knowledge in the law and forms of proceedings; yet by study and giving advice, and by having an account of the proceedings in the court such knowledge might well be obtained; and therefore there is no reason to support the respondents' interpretation of the article of the Union; for the law may well presume that a person who has been an advocate so many years, and of no inconsistent employment, must have acquired, by such conduct as is before mentioned, a sufficient knowledge in the law and forms, which may be well acquired without a local attendance at the bar of the Court of Session: and a calculation of months, weeks, or days of local attendance, at distant and remote times, (such as the respondents seem to aim at), for making up five years, is neither founded in the 19th article of the Union, nor is such attendance, in the nature of the thing, capable of a legal proof.

The respondents objected, that Mr. Haldane, before he had been five years an advocate, was appointed a commissioner and trustee of the forfeited estates, which was inconsistent with his serving as an advocate, since it necessarily called him to attend in that court, during the hours of the sitting of the Court of Session. But no law does require a constant attendance for the space of five years in the court-house where the Session sits, and no advocate does attend in that manner. By the same way of reasoning, an advocate who is commissary of Edinburgh, or a sheriff depute, might be objected to as being incapable of being named to be an Ordinary Lord of Session, because the commissary and sheriff courts meet frequently at the same time with the Court of Session. And in fact the being one of the commissioners of the forfeited estates did not hinder Mr. Haldane's attendance as occasion required before the Court of Session, but obliged him several times to attend, when otherwise it would not have been necessary, and to have the particular concern in the management and direction of a great number of causes before the several courts.

#### *Heads of the Respondents' Argument.*

The Lords of Session being by the laws of the realm, and the ancient established constitution of that court, to try the qualifications of the persons presented to a seat in it, with power to *admit or refuse*, and their authority and privileges being ratified and confirmed by the very article which induces the qualification in question, the enacting that qualification, *ex necessitate juris*, subjects it to the cognizance of those judges, who must determine whether a person be qualified before they can admit him.

Though the words *attendance at the bar* be not found in the article, yet words of the same force and effect are used. It is impossible to *serve in a court* without attending it; and, therefore, where the law requires in express words *service* in the college of justice,

justice, it necessarily implies attendance. It is true, a person may be said to be an advocate in the college of justice, that is to be a member of such faculty, though he actually reside at Westminster or at Rome; but then while he resides at Westminster or at Rome he cannot be said to *serve in the college of justice*.

When the words of a statute have a clear, determinate, and unambiguous meaning, the legislature may alter them; but judges are not at liberty to explain them in contradiction to their known signification upon any arguments drawn from the presumed reason and intention of the law; and therefore, the article having required service for five years as an advocate in the college of justice, the judges neither could nor ought to have expounded it otherwise, than that attendance for five years in the court, where he was to serve as an advocate, was necessary. But if the meaning of the word *service* were in itself doubtful, the obvious intention of the article, and the known constitution of the college of justice, would be sufficient to determine it to that sense, in which the judges have understood it.

Advocates are not admitted in Scotland as gentlemen are called to the bar in England, after a certain supposed attendance on the courts, whereby they are presumed to have arrived at a reasonable knowledge of the laws and forms of proceeding proper to their country. But in place of the municipal law of Scotland, gentlemen intending to enter advocates, apply themselves to the study of the civil law generally in foreign universities; upon that law only they are tried, without the least examination into a supposed knowledge of the laws of their own country, and if they are found possessed of a reasonable degree of knowledge of that law, they are admitted advocates. Thus it happens, that an advocate at his admission is not presumed to know the least title of the municipal law of Scotland, or of the forms of proceeding so necessary towards the right distribution of justice; nor has he any other method to arrive at knowledge in these matters, but in a close attendance on the courts, where experience and observation may perfect his skill.

Taking this to be the case, and supposing that by the article of the Union the nation intended to secure to itself judges of knowledge and experience, what must be the meaning of the word *service*? An advocate of five years standing without attendance, knows probably less of the civil law, without knowing more of the municipal law and form than when he was admitted: an advocate of five years standing, attending on the courts during that space, is in a way of attaining a thorough knowledge of the *law and forms* of his country.

As the law thus expressly requires five years service, it is a question how far the judges could take upon them to overlook even occasional absence of days or weeks; but surely where the absence is *habitual*, and the service only *occasional*, inasmuch that the appellant does not think fit to affirm that he served more than 15 session months in almost seven years, no one can imagine that the intention of the law, which requires full five years service, is

answered

answered by accidental attendance for the half of that time; or that the power of expounding laws entrusted with the judges is so arbitrary, that they can construe the *half* to be equal to the *whole*.

The respondents never imagined, that the office of member of parliament was inconsistent with that of an advocate: but then they take it to be certain that attendance in the parliament at Westminster is inconsistent with *service* in the college of justice at Edinburgh, *during the space of such attendance*. The appellant agrees that he attended locally at Westminster ever since his admission, except about 15 session months: his attendance there, then, made it *impossible* for him to be where he ought to have *served* to qualify himself for the character of a judge, in the terms of law; and, consequently, though the offices are, abstractly speaking, consistent, yet since the *attendance* in the one has made the *service* in the other impracticable, it has the same effect in the present question, as if the offices were truly inconsistent. The same thing holds good as to the other office of commissioner of inquiry; because, as has been before taken notice of, the office hours of that commission were the same with the hours of business in the Court of Session.

The respondents agree, that *absentia reipublice causa*, saves to a man all privileges, whereof he stood possessed, when first he undertook public service: and consequently, that if the appellant had been qualified by *service* as an advocate to be a judge, before he attended the parliament, he could not have lost that qualification by his absence. But they can by no means agree, that a man by entering into the service of the public, can acquire a qualification which the law has said, can no other way be come at, than by service in a particular station. The legislature thought five years service as an advocate absolutely necessary to furnish a person with that knowledge and experience, that is requisite for a judge: now unless five years service as a member of the House of Commons shall be thought as proper a mean of arriving at knowledge and experience of the laws and forms of proceeding in Scotland, as five years service in the Court of Session, the appellant's attendance in parliament brings him as little within the meaning, as it does within the words of the article of Union.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentences of the 28th of December 1721, the 26th of January following, and 8th of June 1722, complained of in the said appeal, be reversed: and it is further ordered and adjudged, that the appellant Patrick Haldane be forthwith put upon trial according to law.*

Judgment,  
4 Feb.  
1722-3

For Appellants, Rob. Raymond. Ro. Dundas.  
For Respondents, Dun. Forbes. Sam. Mead.

Annexed to the case for the respondents is given the following abstract, said to be taken from Mr. Haldane's condescendances of

of the times at which he affirmed that he served in the court, from the time of his admission till the date of his majesty's letter, nominating him to be a judge.

Sessions since his admission, during which he might and ought to have served.				During these he affirms he served in the court of Session.			And thereby admits he did not serve in the court of Session, but attended the parliament.		
	Months.	Weeks.	Days.	Months.	Weeks.	Days.	Months.	Weeks.	Days.
In the Winter Session 1714-15, from 18 January to last February	1	1	2	1				1	2
Summer Session 1715	2						2		
Winter Session following	4						4		
Summer Session 1716	2						2		
Winter Session following	4			3	2			2	
Summer Session 1717	2						2		
Winter Session following	4			1	3		2	1	
Summer Session 1718	2			2					
Winter Session following	4			1			3		
Summer Session 1719	2			2					
Winter Session following	4			1			3		
Summer Session 1720	2			1			1		
Winter Session following	4			1			3		
Summer Session 1721	2						2		
Winter Session following, from 1 Nov. to 12 December	1	1	4	1				1	4
Session time in all	40	2	6	15	1		25	1	6

The respondents state, that every article of Mr. Haldane's non-service in this abstract is vouched by his own words, excepting the first of one week, and two days, which is stated by conjecture upon his own acknowledgment, that during the first Session he was absent for some few days about his election to parliament. And all the articles stated to his account as service, depend singly upon the credit of his own assertion, the respondents having all along denied that he served with them as an advocate, except upon some few occasions.

On the 21st of January 1724, the present appellants presented a petition to the House of Lords, complaining of the further proceedings of the Court of Session, after the judgment given on the appeal; but the Journals do not state the particular grievance. This petition was referred to a committee to consider and report, no report appears upon the Journals, but an act was passed in the same

same Session of parliament, "for explaining the law concerning " the trial and admission of the Ordinary Lords of Session." This act of parliament gives his majesty the right of judging in future, with regard to the matters similar to that which was at issue by the present appeal. 10.G.1.1.19

Kenneth Mackenzie, brother of George Mackenzie of Balmuckie, Roderick Mackenzie younger of Reidcastle, Lewis Mackenzie his brother, Donald Mackenzie of Kilcowie, John Chisholm of Knockfin, and Archibald Chisholm his brother,

Cafe 96

*Appellants ;*

Mr. Daniel Mackilligin, and Mr. John Mackilligin, Ministers of the Gospel at Allnesh, - - - - -

*Respondents.*

6th Feb. 1722-3.

*Spuilzie.—Art and Part.*—Certain persons who were present with the rebels, (under the command of Lord Seaforth,) when a spuilzie was committed, are found liable in damages, conjunctly and severally, for the damages committed by the said party.

The amount of the damages ascertained by the oaths of the pursuers.

Interest allowed from the day, after the party of rebels had left the premises spuilzied.

*Costs and Expenses.*—The appellants having failed to appear, on the day appointed for hearing, the respondents' are heard, and the judgment affirmed with 100*l.* costs.

**I**N May 1718 (a), the respondent Daniel, in his own right, and by virtue of a factory from the presbytery of Dingwall, and the other respondent John, brought an action of spuilzie against the appellants, before the Court of Session, for satisfaction of certain damages occasioned by the appellants; and the respondent stated, that upon Monday the 10th of October 1715, the appellants with a party of armed highlandmen, under the command of the late Earl of Seaforth, came to the village of Allnesh where the respondents resided, and continued there till Saturday the 15th, during which time, they took possession of the houses of the respondents, carried off a great part of the household furniture, and cut and destroyed the rest, carried off, or tore, and destroyed all the respondent Daniel's books, and likewise a library of books belonging to the presbytery of Dingwall, and likewise two parochial libraries, of all which the respondent Daniel was the keeper, destroyed all their corn, and cut and destroyed the planting, and every thing of value that could be found belonging

(a) This is entirely taken from the case for the respondents; none appears for the appellants, and as they deserted the appeal, it is probable that none was presented for them.

to either of the respondents, who upon the approach of the said rebels were obliged to fly for their own safety, and live private for some time; and could not return to their houses for above five months.

The appellants made defences, in general, denying the libel; and a defence of *alibi* was also set up by the appellants Roderick and Donald Mackenzie. In June 1720, of consent, a commission was granted for examining witnesses by the respondents to prove their libel, and for the appellants to prove their defences; and accordingly several witnesses were examined for the respondents, but none were examined by the appellants; and the term was circumduced against them.

The cause coming to be heard, the appellants did not appear, but the Court having heard and considered the depositions in the cause, on the 8th of July 1721, "found it proved, that at the time libelled a party of the rebels, which were then under the command of the late Earl of Seaforth, came to the town of Allnesh, within which the respondents' houses are situated; and that the said party continued there several days, and that by the said party, the respondent Mr. Daniel's house was plundered, his doors, trunks, and chests broken open, and his books and the plenishing and furniture of the house carried off and destroyed; and that his growing corns, his corns in his barn, and barn-yard, and his peats and herbage of his yard, were also consumed or destroyed by the said party: And also found it proved, that at the said time, and by the same party, the respondent Mr. John Mackilligin's house was rifled, his plenishing carried off, his corns, peats, and planting destroyed, and his bee-hives and the locks and doors of his house carried off; and found it proved, that the appellants were all of the said party; and found the defence of *alibi* not proved; and also found that the aforesaid qualifications proved are relevant to infer that the appellants were art and part in the commission of the above spuilzies; and that they are therefore liable conjunctly and severally *in solidum* for the damages which were thereby done to the said Mr. John and Daniel Mackilligins, respondents; and remitted it to the then next week's ordinaries or to either of them, to take the said Mr. Daniel's oath in *litem* on the particulars and the extent and value of his damages, and on the violent profits."

The respondent Daniel having been examined swore to the extent of his damages, and exhibited an inventory thereof; and on the 28th of July 1721, the Court "Having considered the inventories referred to by the respondent Daniel in his oath, and having advised the said oath, found the appellants liable conjunctly and severally to the said Mr. Daniel Mackilligin for the values of the books in the two inventories produced, and also for the sums in the inventory of the goods spuilzied from the said Mr. Daniel, extending in all to the sum of 2482*l.* 12*s.* Scots, and for the interest of the said sum from the 16th day of October 1715 years, and in time coming during

“ the not payment, deducing as is deduced in the above calcul  
 “ the value of the books which the said Mr. Daniel expects to  
 “ get back ; and also found the defenders liable to Mr. Daniel for  
 “ the expence of this process, and for his personal expence in  
 “ attending, in so far as the same should be found necessary or  
 “ reasonable ; and remitted to the Lord Ordinary in the cause to  
 “ liquidate the expence of the process according to the regula-  
 “ tions, and to modify the personal expences.” And the Lord  
 Ordinary accordingly decerned for Daniel’s expences amounting  
 to 645*l.* 9*s.* 4*d.* Scots. The appellants having reclaimed, the  
 Court, on the 29th of July 1721, adhered to these interlocu-  
 tors.

The respondent John being examined upon a commission, also  
 swore to the particulars which he had lost, and the values thereof ;  
 and the Court pronounced another interlocutor (a) of the same  
 nature in John’s cause, and decerned the appellants to make him  
 satisfaction for the sum of 1279*l.* 7*s.* Scots, with interest ; and  
 his expences were decerned for, amounting to 134*l.* 16*s.* Scots.

Both these decrees having been extracted, the appellants brought  
 an action of reduction ; but after a hearing of the cause on the  
 24th of July 1722, the Court “ repelled the reasons of reduc-  
 tion ;” and to this interlocutor they adhered on the 31st of  
 July 1722.

The appeal was brought from “ several interlocutory sentences  
 “ or decrees of the Lords of Session of the 28th of July 1721, 23<sup>rd</sup> Feb.  
 “ 23d February 1721-2, and the affirmances thereof the 24th and 17<sup>th</sup>  
 “ 31st of July 1722.”

*Heads of the Appellants’ Argument.*

Whatever damage the respondents may have sustained, there  
 was no proof that the same was occasioned by means of the ap-  
 pellants, or that any of them took any of the respondents’ goods,  
 or gave any orders for so doing ; it were therefore unreasonable  
 to load them with making reparation for what damage the respon-  
 dents sustained.

There is no proof of the value of the respondents’ damages,  
 but their respective oaths *in litem* ; which was an indulgence they  
 did not so much as pray to be allowed by their libel, and conse-  
 quently must avoid the decree as being *ultra petita*, especially  
 since the action was not commenced soon after the damage  
 done.

The decree gives the respondents interest for their several de-  
 mands from the 16th of October 1715, though in the libel the  
 charge is, that the facts were committed on one or other of the  
 days of September, October, November, December, January, or  
 February of the said year.

The appellants are decreed jointly and severally, to pay the  
 respondents their damages, though it was not prayed by  
 libel.

(a) The date is not mentioned ; but it appears to have been the interlocutor 2  
 February 1721-2, which was appealed from.

The respondent Daniel had allowance for the expences of both actions, and his personal expence in attending the same; and yet, by the decree in favour of the respondent John, he is likewise allowed his expences; so that the appellants were subjected to a double payment of expences.

*Heads of the Respondents' Argument.*

It appears by the proofs in the cause, that all the appellants were present in the village of Allnesh with the armed Highlanders; that several of them were in the respondents' houses at that time; and that during the time the appellants and the rebels were there, the houses of the respondents were plundered by the said rebels, and every thing therein carried off and destroyed. These facts being established, the decree against the appellants must be just; for where a number of men commit violence, it may be very difficult (nor indeed is it necessary) to prove the particular persons who destroyed or took away the goods: It is sufficient to prove that the injury or damage was done by such a party, and that the appellants were of that party, which is sufficiently proved by a multitude of witnesses.

An oath *in litem* is, by the law of Scotland, as much the determined method of proof where a spuilzie is libelled, as writ or witnesses are in any other case; and indeed in most cases of that nature, any other proof is impossible: And no man in his libel is obliged to set forth the method of his proof, and consequently this decree has proceeded regularly and according to the usual forms in such cases. The action was commenced in May 1718, which will avoid any objection from delay.

The libelling of a spuilzie in its own nature implies violent profits, damages, and expences; that is, where the nature of the thing spuilzied admits of violent profits, they are decreed; otherwise the Judges decree interest: and the decree has been very indulgent to the appellants in giving interest, for certainly the respondents must have sustained much greater damage; and their demand thereof was actually libelled. It appears by the proofs that the rebels came to the village of Allnesh on Monday the 10th, and continued till Saturday the 15th of October, during which time the damage was done; and it was therefore regular to decree interest from the 16th of October, since before that time the damage was done.

A spuilzie being libelled against several persons, it imports their being liable jointly and severally; for since they were all accessory to the wrong, the judgment was rightly pronounced, and the same is particularly so libelled.

The respondent John has no allowance for expences, but such as were not allowed to the respondent Daniel; and therefore the appellants are not liable to a double payment; and the respondents conceive that the Court has made them but the just and usual allowances in cases of spuilzie, which indeed are less than the half of the expences which the respondents were out of pocket.

*Whereas*



*Whereas this day was appointed for hearing counsel upon this appeal and answers: Counsel appearing for the respondents, but no counsel for the appellants, and the respondents' counsel being heard and withdrawn, It is ordered and adjudged, that the petition and appeal be dismissed; and that the interlocutory sentences or decrees therein complained of be affirmed: And it is further ordered, that the appellants do pay, or cause to be paid to the respondents, the sum of 100l. for their costs in respect of the said appeal.*

Judgment,  
6 Feb.  
1722-3.

For Respondents,      Ro. Dundas.      Will. Hamilton.

James Macpherson, of Killyhuntly,      -      *Appellant;*      Case 97.  
John Macpherson, of Dalrady,      -      *Respondent.*

11th Feb. 1722-3.

*Trust—Qualifications of trust found to be irrelevant.*

**T**HIS appeal related to certain deeds executed in favour of the respondent, by Elias Macpherson, of Inveresk, being conveyances of his whole estate, bearing to be for onerous considerations, and containing absolute warrandice. These deeds were executed in 1693, 1694, 1695, and 1696.

The appellant's father had a wadset upon the estate of this Elias; and Elias, on the 7th of February 1696, conveyed his right of reversion of this wadset to a trustee for the appellant's father, by a deed bearing to be for onerous considerations. Elias also executed an instrument on the same 7th of February 1696, *declaring upon his soul and conscience*, that the deeds formerly executed by him, in favour of the respondent, were in trust only.

After this period, on the 24th of February 1696, Elias executed another deed in favour of the respondent, reciting certain bonds formerly granted by him in the respondent's favour for money lent, and that the same bonds being returned, he acknowledged the same as the price of his estate remaining unencumbered with wadsets. Elias died without issue, and the respondent having taken steps for the redemption of the wadset now belonging to the appellant, the appellant brought an action of declarator before the Court of Session, to have it declared, that all the deeds formerly executed by Elias Macpherson, in the respondent's favour, were only in trust for the grantor. In this action he insisted that the cause of action having arisen before the act 1696 c. 25. was passed, the trust might be proved by other means than writ, or oath of party, he founded upon the declaration of *soul and conscience*, and other special circumstances in the situation of the parties.

1696, c. 25.

The respondent made defences, and after sundry proceedings the Court on the 13th of July 1721, "found that the qualifications of trust alledged by the appellant, are not relevant and " therefore assilized the respondent and decerned."

The appellant gave in several petitions against this interlocutor, but the Court on the 28th and 29th of July 1721, and 9th of February 1722, "adhered to their former interlocutor."

Entered,  
23 Oct.  
1722.

The appeal was brought, "several interlocutory sentences or " decrees of the Lords of Session of the 13th, 28th, and 29th days " of July 1721, and 9th of February 1722."

(The particular circumstances of the case are stated at considerable length in the appeal cases, but not with sufficient distinctness, to render an abridgement of them useful.)

Judgment,  
11 Feb.  
1723.

After hearing counsel, *It is ordered and adjudged that the said petition and appeal be dismissed, and that the interlocutory sentences or decrees therein complained of be affirmed.*

For Appellant, *Ro. Dundas. C. Talbot.*  
For Respondent, *Dun. Forbes. Will. Hamilton.*

Cafe 98. Alexander Murray, of Broughton, Esq; *Appellant;*  
George Bullerwell, Gentleman, *Respondent.*  
*Ex parte (a)*

12th Feb. 1722-3.

*Process.*—In a competition between two persons, claiming to be heirs to an estate, the inquest refused to retour either of them. One of the parties in an action of reduction and declarator, calls the other as a defender: a third claimant now craves to be admitted, as a defender in this action, stating himself to be in the same degree of propinquity with the other defender, which the pursuer acknowledged. The Court having refused to admit this third party as a defender in that action, the judgment is reversed, *ex parte*.

**J**AMES Earl of Annandale died about 80 years ago, leaving no heirs of his own body, and in default of them, his estate went to the daughters of Sir James Murray of Cockpool, paternal uncle to the said earl. The appellant, and the Viscountess of Stormont, were descended from these daughters.

The respondent laid claim to the estate of the said James Earl of Annandale, in the character of his nearest heir; and took out a brieve from Chancery for serving himself nearest heir; and gave in his claim to the inquest accordingly. The Viscountess of Stormont, appeared as a party by her counsel, and objected to the evidence brought by the respondent, as no wise sufficient to prove that he was heir, or at all related by descent of lawful issue

(\*) This is given entirely from the appellant's case only, no appearance having been made for the respondent.

to the said earl; and at the same time she having also taken out a brieve from chancery, put in her own claim, and insisted that she should be retoured as nearest heir to the said earl. The jury, however not being satisfied with the evidence adduced by either of them, gave verdicts against them both, and refused to retour either of them as nearest heir to the Earl of Annandale.

The respondent thereupon brought his action before the Court of Session, for setting aside the verdict of the jury as erroneous, and to have it found, that he was nearest heir to the earl. To this action, the respondent called the Viscountess of Stormont as a party; but took no notice of the appellant, who (as he states) is the undoubted heir portioner of the said Sir James Murray of Cookpool, father's brother of the said earl, with the said Viscountess of Stormont, and so equally entitled with her in the said earl's succession.

The appellant, however, appeared for his interest by his counsel, in support of the verdict complained of by the respondent, and prayed to be heard against the respondents' claim. And the Court on the 28th of February 1722, "found that the appellant ought to be admitted for his interest."

The respondent reclaimed, setting forth that he had not made the appellant a party; but that the action he was carrying on was of no prejudice to the appellant, the scope of it being only to set aside an erroneous verdict, given by the jury to the prejudice of the respondent; and that it would be still entire, and more proper for the appellant to appear before another jury, which would be called after the erroneous verdict was set aside, and there to object against the respondent's claim.

After answers for the appellant, the Court on the 21st of June 1722, "altered their former interlocutor, and found that the appellant could not be admitted in that action." And to this interlocutor the Court adhered on the 30th of the same month of June and 1st of December thereafter.

The appeal was brought from "several interlocutory sentences or decrees of the Lords of Session of the 21st and 30th days of June, and an interlocutor of the 1st of December 1722." Entered,  
10 Dec.  
1722.

#### *Heads of the Appellants's Argument.*

Though the respondent has not made the appellant a party to the action, that was the respondent's fault and error; but this cannot hinder the appellant from appearing as a party for his own interest, and to defend in an action, the scope of which was to defeat his titles to the estate, and succession of the Earl of Annandale. Besides, by the nature of the brieve, all persons having interest are called, by what is named in the law of Scotland an edictal citation.

The respondent admitted, that the appellant had the same interest and concern with the Viscountess of Stormont, and consequently since she is a proper party to the action, the appellant must be so too. The appellant likewise admitted, that the appellant was a proper party to object to his claim before the jury, and to

have insisted for such a verdict as the jury gave, consequently he must be a proper party to appear in support of that verdict, and to justify it now that it is given.

Journal,  
12 Feb.  
1722-3.

*Whereas this day was appointed for hearing counsel upon this petition and appeal; counsel appearing for the appellant, but no counsel for the respondent; and the appellant's counsel being heard and withdrawn, It is ordered and adjudged, that the interlocutory sentences of the 21st and 30th days of June, and the interlocutor of the 1st of December last, complained of in the said appeal be reversed; and that the interlocutor of the 28th of February, last whereby it is decreed, "that the appellant ought to be admitted for his interest" be affirmed.*

For Appellant, Ro. Dundas. Dun. Forbes.

Case 99. Thomas Rigge, of Mortoun, Esq; - Appellant;  
Alexander Abercrombie, of Tullibodie, Esq; Respondent.

18th March 1722-3.

*Negotiorum Gestor.*—The respondent having sent money by the appellant, to be by a third person laid out in stock, in his own name; on the death of this third person the appellant could not warrantably lay out the respondent's money in stock, in his the appellant's name.

*Proof.*—In this case the son of the person deceased, having by letter given the first notice of the transaction to the respondent, and mentioned that the appellant had informed the writer of the letter, that he had given the respondent his option to stand to the bargain or not, this letter is held to be proof of such option tendered.

IN August 1720, some communications took place between the appellant and respondent, relative to the investing of money in the public funds. The appellant being about to set out for London, the respondent delivered to him two York Buildings Co. bonds of 100*l.* each, with an open letter, addressed to William Baird, of Auchmedden, Esq., then in London: This letter was of the following tenor: "Edinburgh, 9th August, 1720. Dear Cousen, Receive from the bearer Mr. Thomas Rigge of Mortoun, advocate, two York Buildings bonds of 100*l.* sterling each, bearing interest since 23d February last, payable 23d inst.; the interest is 6*l.*; the one is marked letter A. (No. 9.) the other is marked letter A. (No. 309.) I have filled up your name in the indorsation (a) because I design you should put it in stocks for me till I raise more. If South Sea subscriptions can be purchased at 5, or 6, or 7 hundred, for so much ready money, Mr. Rigge will join the equivalent sum of mine in ready money; and if you can procure us credit, if he desire it for the surplus value of a subscription, I shall make the credit good as you, and he shall adjust the sum, either upon our

(a) These bonds were payable to bearer, and needed not indorsement.

"bond

“ bond or bill payable in three months. But if you think South Sea too high, then I desire you may purchase as many shares in the York Buildings as so much ready money, or, if you get credit, for as much more as that will purchase; and if Mr. Rigge join with you for the value of ready money in credit, let us have as many shares in the York Buildings as can be.

“ If Mr. Abercrombie of Glasfaugh, or you will take the burden with him for me, for the said value, or for four or five hundred pounds, I shall make it good, and nobody needs scruple his security. What ever stock you put the money in, let me have the share, or the transfer in my own name, because I resolve to stand to it, especially if it be York Buildings, whereas those upon the place may incline to sell frequently; and I am not sure, but I may come up myself, or at least remit you more money. Let me have your answer upon receipt hereof.” When the appellant arrived in London, he found Mr. Baird, to whom the letter was addressed, at the point of death.

The respondent received a letter from the appellant, dated at London, the 23d of August, 1720, informing him that his friend Mr. Baird was dead, and that he, the appellant had made no bargain for himself, because he thought the stocks would fall lower. And upon the 9th of September the respondent received a letter dated at London the 3d of that month, from Mr. Baird the son of the deceased, acquainting him of his father's death, and that the appellant told him, he had bought South Sea Stock at 780/. per cent, and was willing the respondent's money should be in there or not, as he the respondent pleased; and Mr. Baird mentions that he had not called for the respondent's money from the appellant, but that it was safe in the appellant's hands. About this time secured the great fall of South Sea Stock.

The respondent on the 12th of September wrote both to the appellant, and to Mr. Baird; he told the appellant that having heard of his friend's death, and the surprising turn of the Stocks, he did not incline to meddle with South Sea Stock; and that he had written to Mr. Baird, jun., not to dispose of his bonds in the South Sea. The respondent afterwards received a letter from Baird, dated 20th of September, acquainting him, that the appellant had got payment of the two bonds from the York Buildings Company. The respondent on the 29th of September, wrote to the appellant requiring his bonds; or his money to be sent back immediately: and soon after he received a letter from the appellant, without date, but appearing to have been written about the end of September, or beginning of October, mentioning another letter formerly written by him to the respondent, but never received, by which letter the appellant said he wrote the respondent, that his money was put in with the appellant's own in South Sea Stock at 780/. per cent., including the dividend, by the advice of Alexander Abercrombie, of Glasfaugh, Esq., and Mr. Baird, jun., on the 31st of August.

The respondent brought his action before the Court of Session against the appellant, to have the money from the sale of the

two bonds, repaid with interest from the time they were disposed of by the appellant; *First*, because Mr. Baird being dead the appellant had no commission to dispose of the two bonds: *Secondly*, because the commission was not executed in the terms of his letter to Mr. Baird, for the stock bought with his money, was taken in the name of Mr. Rigge. The appellant made defences to this action, and the Court on the 12th of July 1722, "found that Mr. Baird of Auchmedden, being dead, the appellant had "no power to uplift the money from the York Buildings Company." and in pursuance of this interlocutor the Lord Ordinary on the 14th of same month, "decerned in terms of the libel."

The appellant having reclaimed, insisting that it was the custom of the York Buildings Company to pay their bonds to the bearer without indorstation, or any other title, and that he according to that custom got payment of the bonds, and disposed of the money for the respondent's use as *negotiorum gestor*: after answers for the respondent the Court on the 24th of November 1722, "found that Mr. Baird of Auchmedden, being dead, the "appellant might warrantably uplift the money, and employ it "for the respondent's behoof as a *negotiorum gestor*; but found "that the documents produced do sufficiently make it appear, "that he employed the money and made a bargain in his own "name, that he gave the respondent an option whether he "would accept of the bargain or not, and that the first intimation of the bargain, appears to have been made by a letter from "London (a), dated 3d September, and that the respondent by "his letter dated from Tullibodie, the 12th of September having declined to accept the bargain, he was not *in mora*, nor "bound thereby." The appellant reclaimed against the last part of this interlocutor, insisting that he did not give the respondent his option; that this option was only mentioned in the letter from young Baird, and that it could only be proved *scripto vel juramento* of the appellant: and the respondent having petitioned against the first part of the interlocutor; after mutual answers for the parties, the Court on the 15th of December 1722, "found that the appellant having taken stock in his own name, "though for the behoof of the respondent, this was not to be "reckoned warrantably done, *tanquam negotiorum gestor*, in case "by the forms the right to the stock could have been stated in the "respondent's person, by taking it in his name though absent "without a letter of attorney; but if it could not be so taken, "found in that case, stock might warrantably be taken in the "appellant's name, for the behoof of the respondent; and found "that the letters produced, sufficiently instruct, that the appellant "gave the respondent his option, whether he would accept the "bargain as for his behoof or not, and adhere to that part of "their interlocutor, finding that the first intimation appears to "have been made by a letter from London, 3d September: and "that the respondent by his letter dated at Tullibodie, 12th

(a) The letter from Mr. Baird junior.

“ September, having declined to accept the bargain, he was not “ *in mora*, or bound thereby.” And in pursuance of this interlocutor, the Lord Ordinary on the 19th of December 1722, “ decreed for 203*l.* sterling, of principal and interest due 31st “ August 1720, contained in the said two York Buildings Bonds, “ with the interest of the said sum, since the said 31st of August.”

The appellant having presented another reclaiming petition after answers, the Court on the 9th of January 1723, “ adhered “ to that part of the interlocutor of the 15th of December, finding the letters produced sufficiently instruct that the appellant “ gave the respondent his option whether he would accept of the “ bargain as for his behoof or not; and adhere to that part of the “ said interlocutor, finding that the first intimation appears to be “ made by a letter from London, dated September 3d, and that “ the respondent by his letter dated at Tullibodie, the 12th of “ September, having declined to accept of the bargain, he was “ not *in mora* or bound thereby; and found that this point determining the cause, there was no necessity to determine how “ far the appellant’s acting in this affair *tanquam negotiorum gestor* “ was warrantable.”

The appeal was brought from “ an interlocutory sentence or “ decree of the Lords of Session of the 12th of July, and from “ part of an interlocutor, of the 24th of November, and from “ certain interlocutors of the 15th and 19th of December 1722, “ and 9th of January 1723.”

Entered  
18 Jan.  
1723-2

*Heads of the Appellant’s Argument.*

The acting for the behoof of the absent, and *ejus nomine*, is always reckoned one and the same thing; if the *animus* and intention of the mandator are answered, it is not material by what person. The order was to put the money in South Sea, or York Buildings Stock; this was indispensable, as being the subject of the mandate, and it could not warrantably have been put in any other stock: but as to the *modus* or taking the security, that does not alter the case unless the respondent will shew any prejudice done him by not taking the Stock in his own name; for it was more convenient to take it in the appellant’s name, and saved the expence of two transfers and letters of attorney, one to accept, and the other to sell, before the arrival of which from Scotland the market might have been lost.

As the person to whom the mandate was given, was dead, it could not be executed by him; and the appellant employed his friend’s money, as he did his own, with no other view but to serve him; and if stocks had risen, then the respondent would have had the advantage. But the respondent did not answer the letters for three posts waiting to see whether stocks would rise or fall; if they had risen, then no doubt he would have acknowledged the appellant’s good offices.

It does not appear by any legal proof, that the appellant gave the respondent an option to be concerned in the stocks or not; only Mr. Baird wrote to him, that the appellant had said so; but this

this is not sufficient ; it can only be proved *scripto vel juramento* of this appellant himself. Besides in the same letter Mr. Baird says " you must by first post let Mr. Regge know which of the " two offers you accept of ;" so that supposing such choice had been really given to the respondent, yet he was *in mora* in not answering Mr. Baird's letter of the 3d till the 12th of September, which came to his hands only on the 17th.

*Heads of the Respondent's Argument.*

The respondent never gave any commission to the appellant, either to buy stocks for him, or to take up his money from the York Buildings Company ; the only person he entrusted with the management of his money was the late Mr. Baird of Auchmedden. The only trust committed to the appellant was to carry up his money to London, to be forthwith delivered to Mr. Baird. And though the interposition of a *negotiorum gestor* may be allowed in ordinary affairs, yet the respondent believes no man will be allowed to *game* or practise *stock-jobbing* with another person's money, without an express commission directly given to him for so doing.

Though the respondent had expressly entrusted the appellant with the management of his money, yet he was not bound to take a share of any bargain made by the appellant, unless the appellant had given him immediate notice thereof by such a writing under his hand, as would have obliged the appellant by the laws of Scotland to have given the respondent a share of the profits, in case any had arisen from such bargain ; and the appellant never having given any such notice to the respondent, it would be hard to oblige him to take any share of the loss, since he was no wise entitled to any share of the profit in case any had arisen.

As soon as the respondent had any notice that the appellant pretended he had made any bargain upon the respondent's account, though the notice was sent by a third party, and three days after the pretended bargain was made ; yet the respondent was so diligent as to write by the very next post to the appellant, declaring that since his friend whom he had entrusted was dead, he would have nothing to do with the stocks nor venture any of his money that way.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentences or decrees therein complained of be affirmed : And it is further ordered that the appellant do pay or cause to be paid to the respondent the sum of 20l. for his costs by reason of the said appeal.*

For Appellant, Rob. Raymond. Sam. Mead.  
For Respondents, Dun. Forbes. Will. Hamilton.

Judgment,  
18 March  
1723.



Elizabeth Duchefs Dowager of Hamilton  
and Brandon, - - - *Appellant* ; Case 100.  
James Duke of Hamilton and Brandon, and  
Alexander Gillies, - - - *Respondents.*

21st May 1723.

*Fiar and Life-renter.*—The Court of Session having found, that a fiar had the right to cut and fell woods growing on part of an estate, that was life-rented, the judgment is reversed.

**I**N 1693, William, Duke of Hamilton, and Anne, Duchefs of Hamilton, executed an entail of all their estates, settling the same upon themselves, and the longest liver of them in life-rent, whom failing to James Earl of Arran, their eldest son, and the heirs male of his body; with several other substitutions of heirs, and with prohibitory, irritant, and resolute clauses against selling or contracting debt; but it contained a power to the said Earl of Arran to grant a life-rent provision and jointure, out of any part or portion, or out of the whole lands and barony of Kinneill, Carridden, Abbotscars, and Lockhouse (which had formerly been the separate estate of the said Anne, Duchefs of Hamilton, and of which the Earl of Arran was then in possession for his maintenance) in favour of a wife or wives whom the said Earl should marry, not exceeding the sum of 1500*l.* sterling of yearly rent; provided the said William Duke of Hamilton, if then in life, should be consenting to such marriage, and should join in the settlement of such life-rent, provision, and jointure. In July 1694, this entail was duly recorded in the register of entails.

A marriage being intended between the said James Earl of Arran, (afterwards Duke of Hamilton) and the appellant, the Earl, on the 15th of July 1698, executed a bond of provision or jointure to the appellant, whereby, after reciting the said entail, and the power thereby reserved to him, he obliges himself to provide and secure the lands and barony of Kinneill, with the castles, towers, fortalices, houses, yards, parks, woods, forests, fishings, &c. in life-rent to the appellant, and to warrant the said lands and premises to have been worth, and to have paid for several years before, and to be worth and pay yearly during the said life-rent the sum of 1500*l.* And in a marriage-contract of same date, this life-rent provision was accordingly settled in these terms.

James, Duke of Hamilton, however, not having been infest at that period in the premises, it became necessary that the settlement should be confirmed by Anne, Duchefs of Hamilton, his mother. And on the 30th of March and 20th of April 1702, another

another deed was executed by James, Duke of Hamilton, with consent of his said mother in favour of the appellant reciting the foresaid bond and obligation entered into by the said Duke, and in implement and corroboration thereof, disposing and conveying the said lands and barony of Kinneill, with the parks, woods, and collieries to the appellant in life-rent, in case she should survive the Duke, her husband. Upon this last deed sasine was taken in favour of the appellant, and duly recorded. And after the death of her husband in 1712, the appellant entered to and had since possessed the said premises granted to her in life-rent.

In January 1722, the respondent, the duke, and his curators, entered into an agreement with the other respondent, Gillies, to which the appellant was not a party, whereby they sold and disposed to the said respondent, Gillies, all the growing timber in the wood and parks of Kinneill (adjoining to which was the only house which the appellant had upon her life-rent estate) consisting of oak, ash, birch, elm, alders, and other timbers, with liberty to cut the same at the times in the said agreement mentioned, to the effect the said Gillies might cut down and dispose of the same, as also the grass in the said wood before the axe, with power to build houses in the said parks for the convenience of the woodcutters; and with an obligation that the gates of the said parks should, during that term of years, be open to the said Gillies at pleasure, and that he should have free passage through any part of the said parks for carrying away the timber, bark, &c. In consideration thereof the said Gillies bound himself to pay 900*l.* at the several times therein mentioned.

Gillies accordingly cut down part of the said wood; but when several persons to whom he had sold the same, came to carry it away, the appellant ordered the gates to be shut, prohibited Gillies from cutting any more trees, and would not allow any person to go near the said woods, and brought a suspension against Gillies before the Court of Session.

The respondents, the duke and Gillies, thereupon applied to the Court of Session, stating the circumstances of the case, and praying that the gates and passages might be opened, and that their lordships would discharge all obstructions and interruptions to the regular cutting and carrying away of the woods in terms of the foresaid agreement. The appellant having made answers, the Court, on the 12th of July 1722, “ found that the respondent, Gillies, ought to be allowed to carry off and dispose of “ so much of the said wood and bark as he had then cut, on his “ giving security to pay the value to the appellant or respondent, “ which of them should be found to have best right in the event, “ and give security to fence sufficiently that ground whereon the “ wood he had cut was growing; and for that effect ordained the “ appellant to cause make open the entries and passages, that the “ said Gillies might have access to carry off the said cut wood “ and bark in the same way as before the said passages were of

“ late

“ late shut up and stopt, and declared the value of the cut wood  
 “ should be subject to the making up to the appellant the damages  
 “ she had sustained, or might sustain, so far as in the event it  
 “ should be found she ought to have been *indemnis*, and remitted  
 “ to the Lord Ordinary to hear procurators for the appellant and  
 “ respondents concerning the right to the wood by them respec-  
 “ tively pretended, and stopped further cutting in the mean  
 “ time.” And after another petition for the respondents with  
 answers thereto, the Court, on the 27th of July 1722, “ granted  
 “ liberty to the respondent, Gillies, to proceed in cutting down  
 “ what remained to be cut of that year’s division, upon giving  
 “ security as aforesaid.”

The respondent, the Duke, also brought his action of declara-  
 tor to have it found, that he only had a right to cut the said wood ;  
 and after defences for the appellant, and a hearing in presence,  
 the Court, on the 25th of January 1723, “ found that the ap-  
 “ pellant, the life-rentrix, might use the woods of Kinneil for  
 “ her proper uses, and for keeping in repair the houses on the  
 “ lands of Kinneil, which she life-rents; but that she had no  
 “ right to cut or dispose of the said woods by sale or other-  
 “ wise, and remitted to the Lord Ordinary to proceed ac-  
 “ cordingly.”

The cause being accordingly heard before the Ordinary, his  
 lordship, on the first of February 1723, “ found that the appel-  
 “ lant must allow the respondent and the said Alexander Gillies,  
 “ and the persons employed by him, free passage in cutting and  
 “ carrying away the said wood and timber thereof, and to proceed  
 “ in cutting of the said wood, and executing the hails powers  
 “ granted to the said Alexander Gillies by the contract made  
 “ concerning the cutting of the said wood, carrying away the  
 “ timber thereof, and the whole other powers in the said contract  
 “ contained, and discharged the appellant to obstruct or hinder  
 “ the same; and found and declared, at the respondents’ instance,  
 “ conform to the conclusion of the said summons of declarator  
 “ against the appellant, and the interlocutor of the Lords in pre-  
 “ sence, and suspended the letters at the appellant’s instance  
 “ against the said Alexander Gillies, and decerned in the above  
 “ terms; but found that the respondent must make up to the ap-  
 “ pellant what prejudice she shall suffer in the grass, through  
 “ cutting and carrying away the said wood and timber thereof,  
 “ and by the straying of cattle through the keeping of the gates  
 “ and passages open; and that he must either leave so much of  
 “ the woods standing as may answer the uses competent to her as  
 “ life-rentrix, in terms of the interlocutor in presence, or furnish  
 “ her with other timber in place thereof.”

The appeal was brought from “ an interlocutory sentence or  
 “ decree of the Lords of Session of the 25th of January 1723.”

Entered  
 28 Feb.  
 1722-3.

*Heads of the Appellant's Argument.*

The appellant having the lands and barony of Kinneill, and parks and woods secured to her for life, the Duke of Hamilton (a), who has the reversion, cannot enter thereupon, or cut or dispose of any wood growing upon the same without her consent. And the appellant is in a much stronger case than if she had only a life-rent in the lands; because the very woods themselves are expressly made over to her in life-rent, which she is advised does entitle her to cut and dispose of those woods in a proper course, if the same happen to be fit for cutting during her life, because otherwise the conveyance of the woods can have no meaning at all; and consequently for the duke to dispose thereof, is to take to himself part of the profits to which the appellant is entitled.

If the appellant be not entitled to cut or dispose of the said wood for her own use and profit, yet at least the respondent can have no power during her life to cut the same, and thereby not only to deprive her of the ornament and shelter the said wood gives to her dwelling-house, but to render the park (to which her right is undoubted) useless and unprofitable to her for a term of years, that may be as long as her life. But the decree seems inconsistent with itself, since it finds that the appellant may use the woods for her proper uses, and for keeping in repair the houses on the lands which she has for her jointure; and yet decrees, that the Duke of Hamilton may cut or dispose of the same woods by sale or otherwise.

It was contended for the respondent, that the late Duke of Hamilton, by the entail of his estate, was so tied up, that he could make no jointure to a lady exceeding 1500*l.* per annum, and that the rent of the barony of Kinneill, over and above the woods, extends to that sum; and therefore that the appellant cannot be understood to have got a right to cut and dispose of the woods. But the appellant's right flows from Anne, Duchess of Hamilton, who was under no limitation, as well as from the late duke. And the limitation in the entail concerns only the rents of lands, but there is no restriction as to the power of disposing of woods. If the rents of the appellant's life-rent estate were higher (as they are not) than the sum which the late duke was empowered to grant by way of jointure, the respondent may take his remedy so far to avoid the settlement by due course of law, but cannot seize the appellant's park, destroy the wood, and render it useless on pretence her jointure is too large. But the decree over-rules this objection; for it presupposes and admits that the appellant has a life-rent in the woods, though it deprives her of the benefit of it.

(a) It is nowhere stated in either of the Cases, whether or not the appellant was the respondent, the duke's mother; but from Douglas's Peerage it appears that she was so.

*Heads of the Respondents' Argument.*

As the law does not give the mere life-renter any power of cutting woods, so the inserting of the words "*the woods*" in the bond of provision is only in course of stile, amongst other pertinentes of the estate granted, and cannot give any power inconsistent with the right of the life-renter: the import can only be that the appellant may have the use of them for necessary repairs; especially since a life-renter is, by several acts of parliament in Scotland, directed to find security not to cut the woods. The wood in question is not underwood, or *silva cadua*, to be cut by yearly proportions, but is such a wood as is cut only once in 40 or 50 years: woods of that kind are *pars soli*, and do not belong to the life-renter, that would be giving the appellant an advantage that was not at all intended for her.

1491, c. 25.  
1535, c. 15.

The late Duke of Hamilton had no power to settle a jointure but what was given to him by the deed of entail; in that he is restricted to settle a jointure out of *the lands and barony of Kinneill*, without any mention of woods; and if therefore the inserting the woods in the bond of provision, could be construed to be of any import, they are beyond the power which the duke had, and consequently of no effect. The late duke by the said entail, could not provide a jointure exceeding 1500*l.* per annum; and the appellant has so much exclusive of the woods, consequently there is no reason for the appellant to claim the profit of these woods.

The appellant contended, that this entail was not completed in the late duke's person by infeftment, and the late duchess, (whose the estate was,) having joined with the duke in this bond of provision to the appellant; whatever they granted to her ought to be effectual, especially since infeftment was made to her prior to any sasine upon the entail. The act of parliament 1685, concerning entails does indeed require the irritant clauses to be inserted in the procuratories of resignation, precepts of sasine, &c. but no where declares them of no force if no infeftment is made; on the contrary it expressly says, "That the original entail once produced before the Lords of Session judicially, and recorded in the register appointed for that effect, the entail so insert shall be real and effectual not only against the contraveners and their heirs, but also against their creditors and other singular successors, whether by legal or other conventional titles." And the consequence is, that this settlement being recorded is binding upon the appellant. Besides, the appellant had full notice of this entail; it is expressly recited and taken notice of in her bond of provision, and the jointure granted in pursuance of the power thereby given to the late duke; if then he had no power to settle the woods, as he had not, then the appellant can have no claim thereto.

Nor will it alter the case, that the late Duchess of Hamilton joined in the settlement upon the appellant; she was but a life-rentrix at that time, and she conveys nothing but only consents to the settlement made by her son. It is to be remarked that the  
appell-

appellant has brought no action to have her right to cut the woods established.

Notwithstanding the settlement of a jointure, the fiar has a power to cut the woods, because otherwise the woods upon the estates that are life-rented might become altogether useless, and decay, by not being cut when at a proper growth; and indeed this is the case of the woods in question, for if they are not cut they will in a little time be good for nothing. It is the undoubted law of Scotland, that the fiar has the power of cutting the woods; thus the learned Craig L. 2. Dig. 8. pag. 189. Says "Neque enim unquam tertia terræ impedimento fuit Domino, quo minus universam suam Silvam vendere potuit, quod nuper inter Ramfeum de Dalhousie, & Mariam Ballandinam, prædecessoris sui conjugem, factum vidi." He likewise says, "That even the grantee of the life-rent escheat has no power to cut woods:" and thus the judges determine in all such like cases.

Since the respondent, the duke, has a right to cut, he must also have the use of the ways and passages, because necessary to his right; but the decree has abundantly provided a satisfaction to the appellant for any loss she may sustain thereby, which satisfaction is to be paid in the first place out of these woods.

As these woods will necessarily decay and grow good for nothing if not now cut, so it would seem unreasonable that had the appellant any right to hinder the respondent from cutting them, she should do it, under the notion of the pleasure of the woods in a place where she has not been two months in ten years, that she has been in possession of the estate; and the respondent would be as far from destroying the pleasure of that place as the appellant; but he justly apprehends that if the wood be not cut, the pleasure will be destroyed, especially as one-sixth of the whole is now cut. If the residue be cut, in a very few years it will be more pleasant than now.

The respondent is very far from calling in question, or endeavouring to diminish the appellant's jointure. His father had a power of settling 1500*l. per annum*; and the appellant is in possession of that income, exclusive of the woods. The respondent did before the Court agree, that she should have 1500*l. per annum*, and if there should be any deficiency in the rental, that he should make it up to the appellant.

After hearing counsel, *It is ordered and adjudged, that the said interlocutory sentence or decree be reversed.*

For Appellant, *Ro. Dundas. P. Yorke.*

For Respondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Judgment,  
21 May  
1723.

Simon Lord Lovat, - - - Appellant; Case 101.  
 Hugh, the Son of Alexander Mackenzie of  
 Frazerdale, styling himself Hugh Master  
 of Lovat, - - - Respondent.

22 May 1723.

*Life-rent Escheat.—Aliment of the Fiar.*—An estate being settled by entail, upon a person in life-rent, and a certain series of heirs in fee, with the burden of an aliment to the first substitute: the life-renter forfeits his life-rent escheat for treason; and the Court of Session having, in a competition with the donator, granted an aliment to the fiar, their judgment is reversed.

AFTER the determination in the two former appeals, a new question arose between the appellant, the grantee of the life-rent escheat of Alexander Mackenzie of Frazerdale, the forfeiting person, and the respondent, the eldest son of this Alexander Mackenzie, and of Emilia, the heir female of the family of Lovat, who styled herself Baroness of Lovat.

By the deed of entail executed by Lord Prestonhall in 1706, in the last appeal mentioned, he settled the estate of Lovat upon Alexander Mackenzie, the forfeiting person, his son, in life-rent, and upon his grandson the respondent, and the heirs male of his body, in fee, with several other substitutions of heirs: and the deed contained this condition and proviso, *inter alia*, That the life-rent of the said Alexander should "be subject to and with the burden always of alimentering and educating the said Hugh Master of Lovat" (the respondent) "and other heirs of tailzie above mentioned, according to their rank and quality." And in the charter and sasine subsequently obtained, the said provisions and conditions are repeated.

In April 1721, the respondent Hugh, by his father and curator Alexander Mackenzie of Frazerdale, who had then received his majesty's pardon, brought his action against the appellant before the Lords of Session in Scotland, insisting that the life-rent of the said Alexander Mackenzie had been burdened with the alimentering of the respondent; and the appellant having come in the place of the said Alexander, the respondent ought to be alimentered by him.

The appellant made defences, and after a hearing of the cause, the Court, on the 6th of February 1722, "Found that the respondent is entitled to an aliment out of the estate of Lovat, whereof he is fiar." The appellant having reclaimed, after answers for the respondent, the Court, on the 24th of February 1722 "found that the respondent the fiar of the estate of Lovat is entitled to have an aliment out of the rents of the estate of Lovat, which was life-rented by the said Alexander Mackenzie, and whereto the appellant had right as donator of the said Alexander Mackenzie's life rent escheat; and allowed to either

G g

" party

“ party a conjunct probation to prove the yearly rent of the said life rented lands and deductions, and granted warrant for letters of diligence to that effect.”

Accordingly a proof was taken, by which it appeared that the appellant was in possession of the estate of Lovat, the yearly rent of which amounted to 10,000 merks, free of all burdens; and on the 11th of December 1722, the Court modified 2000 merks of “ yearly aliment to the respondent, to commence from the date of the summons of aliment, on the 12th day of April 1721; and remitted to the Ordinary on the bills to allocate lands, out of which the same should be uplifted by the pursuer himself, free of all public burdens.”

In pursuance of this remit, the Lord Ordinary on the bills, on the 26th of the same month of December, allocated to the respondent the lands of Ingliston, Kirkton, Grolin, Fingask, and the mains of Lovat, to be possessed by him during his father's life, in payment of the said aliment.

The appeal was brought from “ two interlocutory sentences or decrees of the Lords of Session of the 24th of February 1722, and 11th of December thereafter.”

Entered,  
17 Jan.  
27-2-3.

#### *Heads of the Appellant's Argument.*

There is no colour or pretence in the law or practice of Scotland, for compelling the superior or his grantee, in whose hands lands are, by the forfeiture of his vassal's life-rent escheat, to allow any aliment to such vassal's heir, or to the fiar, where the forfeiting person is tenant for life only; no casualty of superiority is more frequent in Scotland than that of life-rent escheat, and yet no single instance can be produced, where a claim of this nature was ever insisted on, or sustained.

The obligation which lay upon the forfeiting person to aliment the respondent was purely personal, and could not have afforded any real action against the estate of the forfeiting person prior to the forfeiture; wherefore by the law of Scotland, it cannot affect the appellant's gift, which is preferable to every claim that did not afford a real action against the estate prior to the forfeiture.

As this is the undoubted law of Scotland, so it has been declared by the judgments on the two former appeals; the first of which decreed, that the estate in the appellant's possession should be chargeable with such debts only as were real, and did by the law of Scotland affect the same at the time of the forfeiture; and the second adjudged, that the debt due to Alexander Mackenzie of Garloch, though made a burden on the forfeiting person by the conditions of the settlement of the estate, as being a debt of the grantor's, was not real, so as to be preferable to the appellant, because it yielded no real action against the estate at the time of the forfeiture. Now if real debts only in this sense can affect the estate, it is impossible that the respondent's claim, which was no more than an illiquid demand upon his father, and did



did not at all affect the estate, can be preferred to the appellant's right.

The respondent's claim prior to the forfeiture was so unsettled and weak, that even the personal creditors of Roderick Mackenzie, the maker of the settlement, must, by the law of Scotland, have been preferred to it: Now the appellant's right having already been found by the House of Lords effectual to exclude those personal creditors, who have the very same provision made in their favour by the settlement of the estate as the respondent has, it cannot well be imagined for what reason the respondent's claim, which is less effectual than that of those other creditors, should be preferred to the appellant's grant.

Supposing an aliment had been due, which it is conceived was not, the most the Court could have done, was to have decreed the appellant to have paid the sum modified, upon which proper process might have issued. But, before the appellant was in contempt, to have turned him out of possession, and to have decreed that the respondent should be put in possession of lands, such as he thought fit to name, lying in the neighbourhood of the appellant's dwelling-house, appears to be an act in itself unreasonable, and very greivous to the appellant; tending like the other decrees already reversed, to render his majesty's grant altogether ineffectual to him.

#### *Heads of the Respondent's Argument.*

The aliment and maintenance of the respondent the minor was, by the express appointment of the donor, who gave the life-rent of this very estate to the forfeiting person, charged upon that life-rent, and was an inseparable condition upon which it was granted; consequently the grantee could not have that life-rent but with its burden, viz. the aliment of the respondent the minor. And this is the stronger, since the life-rent of Mr. Mackenzie, was not a reserved life-rent, but a life-rent constituted by the voluntary deed of settlement of the respondent's predecessor, to whom he must have been heir. Nor can this be looked upon to be only a personal obligation upon Mr. Mackenzie to maintain his heir; because the grantor of that very life-rent to Mr. Mackenzie, has charged that life-rent with this aliment, and it was a condition upon which his life-rent was to subsist.

The reason for preferring the appellant to the creditors was, that their debts not being particularly mentioned, and specified in the deed of settlement, did not infer any real charge upon the estate in prejudice of the grantee, as they were not made real by diligence before the grant was made: but this does not meet the case in question, because the burden of the aliment of the respondent is particularly mentioned, and the life-rent subjected to it. Besides the aliment could never be made more real upon the life-rent than it was; it being both a condition, and a burden, upon the life-rent estate, and consequently upon the profits of that estate in the hands of the grantee.

Judgment,  
22 May  
1723.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentences or decrees complained of in the said appeal be reversed.*

For Appellant,	<i>Rob. Raymond,</i>	<i>Dun. Forbes.</i>
For Respondent,	<i>C. Talbot.</i>	<i>Will. Hamilton.</i>

Case 102. Alexander Mill of Hatton, William Ross,  
and David Butter, Baillies of the Town of  
Montrose, for themselves and other Ma-  
gistrates of the said Town, - - - *Appellants;*  
Colonel Robert Reid and Others, Members  
of the Town Council of the said Burgh, *Respondents.*

23d May 1723.

*Member of Parliament.*—In an action to reduce the election of certain magistrates of a royal burgh, on account of the imprisonment of certain of the electors by the provost, who was a member of parliament: the provost's privilege of parliament could not be pleaded to stop the declarator against the other defenders, as not elected by a sufficient quorum:

And the provost's privilege of parliament could not stop the pursuers from insisting upon the reason of reduction, that some of the electors were unwarrantably imprisoned by the provost.

*Burgh Royal.*—It was relevant to annul the election of magistrates, that the provost had unwarrantably imprisoned some of the electors, during the time of the election, with an intention to prevent their giving their votes at that election.

THE town of Montrose, by the set or constitution of the burgh, was governed by a town council, consisting of 19 members, viz., a provost, three baillies, a dean of guild, a treasurer, a master of the hospital, 10 common council-men, who are merchants, and two other common council-men, who are tradesmen. This town council was elected annually about Michaelmas by the old council; seven of them being continued for the year following, and 12 new ones being chosen.

On Wednesday preceding Michaelmas day 1722, an election was held for the said burgh, at which James Scott, Esq. of Logie, a member of parliament was chosen provost, the appellants baillies, and certain other persons, councillors of the said burgh; but the respondents, who were aggrieved by the election thus made, soon after brought an action of reduction and declarator against the same before the Court of Session. The circumstances of the case as stated by the respondents were;

That the method of election was that, upon the day of election, all the magistrates and councillors should meet in the town-house, or at least a majority of the whole, being 19, and there the old council elected the new, the provost, the 3 baillies, the dean of guild,

guild, treasurer, and master of the hospital, for that year, being ~~the~~ *officers* continued members of the council for the ensuing year :

That at the Michaelmas election 1722, James Scott Esq. of Logie, the then provost, and the appellants, were anxious to continue themselves, and their friends in the management : but finding that the majority of the then town council, would be for bringing in a new set of burgeses, they resolved to prevent some of the councillors, who would not fall in with their measures from coming to the election ; and in order thereto, the then provost, on the morning of election, ordered four of the councillors to be carried to prison, upon pretence of some personal insult or disrespect to himself : and most of the councillors, thinking the liberties and privileges of the burgh infringed by this mode of proceeding, absented themselves from this pretended meeting ; but sent Mr. Murison one of their number, to protest against the illegal practices thereof :

That the appellants and their associates finding their number was but eight, reckoned Mr. Murison, (who went there only to protest against their proceedings) as the ninth ; and to make up the tenth, they made one of their friends appear as proxy, for one of the absent councillors, without any warrant or order for so doing ; and then chose a new town council :

That Mr. Murison protested against all these illegal proceedings, and demanded that the four councillors who was imprisoned should be liberated, before they proceeded to an election, and offered caution for their appearance to answer to any crime with which they should be charged, which was refused : and immediately after this irregular election was over, the four councillors were set at liberty ; and were never afterwards prosecuted for the crimes alleged against them : and as soon as these four were liberated, eleven members of the town council, being a majority of the whole, met and proceeded to a due and regular election of magistrates and councillors for the ensuing year.

The appellants made defences, that the action being brought to overturn the election of Mr. Scott, of Logie, as provost, and the other magistrates of the town, upon an alleged act of violence committed by Mr. Scott, the respondents could not proceed in their action against Mr. Scott, because of his privilege of parliament ; nor against the appellants, who were the other defenders, because they were in society together, and therefore no action could lie against them, unless Mr. Scott was made a party.

The cause being heard before the Lord Ordinary, his lordship on the 22d of December 1722, “ Sifted process against the said  
“ Mr. Scott, during his privilege of parliament ; but sustained  
“ process against the appellants ; and before answer allowed the  
“ respondents to prove their libel, that there was not a quorum  
“ at the election, and that there were four of the town council in  
“ prison at the time of the election.” And on the 27th of the same month his lordship “ sustained process against all the de-  
“ fenders, and allowed a proof to be led against them, and against  
“ Mr. Scott.”

The appellants having reclaimed, a hearing was had in presence of the whole Court, and on the 8th of January 1723, their lordships "found that Logie's privilege could not be pleaded to stop the declarator against the other defenders, as not elected by a sufficient quorum." A second reclaiming petition was presented, upon which a fresh hearing was had, and the Court on the 19th of January 1723, "found that Logie's privilege could not stop the pursuers from insisting on that reason of reduction of the other members, viz. that some of the members of the council were unwarrantably imprisoned by Mr. Scott of Logie." And by another interlocutor of same date, they "found it relevant to annul the election of the other members, that Logie unwarrantably imprisoned some of the members of the council during the time of the election."

Entered  
8 Feb.  
1722-3.

The appeal was brought from "the interlocutory orders of the Lords of Session in Scotland of the 8th and 19th of January 1723."

#### *Heads of the Appellants' Argument.*

It seems very unreasonable to oblige the appellants to justify an act of Mr. Scott's, when at the same time there can be no proceedings against Mr. Scott himself. He may have very good reasons to allege in support of what he did, of which the appellants may be entirely ignorant; or supposing they should be acquainted with them, they may not be furnished with proper vouchers for justifying them; and therefore the appellants should not be obliged to plead to the action, till Mr. Scott can be regularly proceeded against. It is not so much as charged by the respondents, that the appellants were concerned with Mr. Scott, or accessory to the illegal act said to be committed by him; and it is at least a very new method of proceeding to compel the appellants to justify this act, at the hazard of losing their right, when not only the principal, but the only actor cannot be proceeded against.

Supposing the fact were proved against Mr. Scott, yet it seems highly unreasonable, that any act of his to which the appellants were not at all accessory, should be made use of to set aside the election of the appellants. Every man ought to suffer for his own faults; and therefore it is hardly to be conceived how Mr. Scott's act can affect the appellants. The case is the same as if Mr. Scott had not been present at the election, and the other electors had proceeded to make a choice without him, that election no doubt would have been good; how, then can the presence of Mr. Scott against whom there may be an objection upon a fact committed by him only, be made use of as a handle to set aside the act of election, which of itself can subsist without the intervention or presence of Mr. Scott?

The respondents contended that it is sufficient in order to avoid the election, to insist that some of the members of the council, and the electors were unwarrantably detained, nor was it of any moment by whom, or by whose directions they were so detained. But were this reason sufficient, it would be in the power

power of any person though not an elector, by unwarrantably detaining any one of the electors, to set aside every election of magistracy, and introduce the greatest confusion. It would be the more unreasonable in this case, because neither by the law, nor the constitution and practice of this burgh, is any particular number of electors necessary to be present when an election is made; the day for the election is fixed for the Wednesday before Michaelmas, and the persons elected by the majority of the electors then present, are, and always have been, considered as duly and regularly elected: and the appellants were, accordingly, without any accession to any unwarrantable act upon their part, regularly elected by the majority of the electors present on the proper day, and in the proper place appointed for that purpose.

*Heads of the Respondents' Argument.*

The Lords of Session allowed of Mr. Scott of Logie's privilege of Parliament as a protection to himself, without entering into any dispute, whether that privilege could protect him against any action brought against him as a member of a corporation; and the respondents conceive that he could not by such privilege protect his fellow magistrates and councillors from the just suit of the respondents; there being nothing more common, where members of parliament are jointly or severally bound in bonds with other persons, than the bringing actions against the other persons bound, though no action be commenced against the members upon account of their privilege.

Though by the written set of the town, no quorum was expressly fixed, yet custom and reason determined, that no number of the council under ten, which is a majority of the whole could proceed to do business, more especially business of such weight as the election of a new town council, for if any lesser number should be allowed, it would be impossible to determine where to stop, or why two or three met together in the council-house may not be a *quorum*, and have a power to elect a new town council, or determine business of the greatest consequence to the town: The appellants indeed founded upon a precedent in 1719, where there were but eight present at the election of a new town council, and where they chose proxies for two more to make up the number ten; but no argument could be brought from this precedent, since they could not shew that it was ever practised before or since.

It appears from the very facts themselves, that the four members were imprisoned, in order to influence the election, and to prevent a majority of the town council's being against the provost and his friends, which would have happened if a free election had been allowed; for the appellants themselves acknowledge, that six or seven of the council were walking in the streets, and would not come up to the place of election; which number, with the four that were imprisoned, would have made a majority of the town council; but by this act of Mr. Scott's he procured himself to be elected as provost, and his other friends to be brought in as magistrates or councillors for the year following. And, there-

fore, though the appellants had been entirely ignorant of the imprisonment of the four councillors, yet their own election being the effect of this act of violence, ought to be declared void; for in such cases *non queritur an is cui convenitur, an alius, vim facit.*

The appellants were all accessory to this illegal act, in so far as they openly and knowingly took advantage of it to get themselves elected as magistrates and councillors. And particularly the appellant Mr. Mill, as a magistrate, was accessory thereto, he being one of the magistrates of the town at that time. Though the council, as such, have no jurisdiction, yet Mr. Mill, as a magistrate, might have joined with Mr. Murison, who was another magistrate, then present, and they two as such might have liberated the imprisoned members upon giving good bail, which privilege ought not to be refused to any subject, who is not imprisoned for some heinous crime.

Judgment,  
23 May  
1723.

After hearing counsel, *It is ordered and adjudged, that the interlocutory order of the 8th of January be affirmed; and it further ordered and adjudged, that the interlocutory order of the 19th of the same January, whereby the Lords of Session found, "that Logie's privilege could not stop the pursuers from insisting in the reason of reduction of the election of the other members, that Logie unwarrantably imprisoned some of the members of the council during the election," be affirmed; and as to the second interlocutory order, of the same date, it is further ordered and adjudged, that it is relevant to annul the election of the other members, that Logie unwarrantably imprisoned some of the members of the council during the time of the election, "with an intention to prevent their giving their votes at that election;" and with this variation and addition the same last mentioned interlocutor is hereby affirmed.*

For Appellants,	Dun. Forbes.	Will. Hamilton.
For Respondents,	Rob. Raymond.	Will. Fraser.

*Ex parte*

Alexander Abercromby, Esq; of Glasshaugh,  
for himself and the other Creditors of  
Alexander Wilson of Littlefield, deceased, *Appellant*;

Case 103.

John Innes of Knockorth, and Lewis Donaldson, Writer in Edinburgh, Son, Heir,  
and Executor of John Donaldson, deceased,  
- - - - - *Respondents.*

31st Jan. 1723-4.

*Trust.*—Trustees chosen by creditors, who had a salary for their trouble, having thrown the debtor into prison on a caption, but afterwards liberated him without applying to the creditors for their consent; the debt being afterwards lost, it was relevant to make the trustees liable for the debt that they consented to the debtor's liberation.

ALEXANDER WILSON of Littlefield, being greatly in debt to several persons at the time of his death, his creditors agreed to appoint trustees for the purpose of taking joint measures for recovery of their claims. The respondent John Innes, and John Donaldson, father of the respondent Lewis, were appointed such trustees, and they were to be allowed not only their expences, but an allowance for their trouble. In January 1707 these trustees were accordingly confirmed executors creditors to the deceased, and possessed themselves of considerable part of his estate.

One Robert Saunders, late provost of Banff, being indebted to the deceased in the sum of 2000 merks, the trustees raised and carried on an action against him for the same, whereupon he was thrown into prison. Afterwards the trustees, without consulting the other creditors, released him from prison, without taking any security from him for the money due. Saunders some years after became insolvent, and the debt was totally lost.

The other creditors thereupon brought an action against the trustees, to compel them to render their accounts, and pay what was due by them. In this action the creditors insisted, that the trustees should be charged with the said debt of 2000 merks due by the said Saunders, in regard they had by a regular process thrown him into prison, and had afterwards liberated him without the consent of the creditors, whereby the debt was lost. After sundry proceedings upon this point, the Lord Ordinary, upon the 29th of January 1715, "Found the trustees' consent to Provost Saunders' liberation relevant to make them liable for the debt."

The trustees thereupon offered to prove, that Provost Saunders had paid one-half of the debt to Wilson, the deceased, in his lifetime; and the Lord Ordinary, on the 1st of February 1715, sustained this defence of payment as relevant to be proved, and gave the

the trustees till the 20th of that month to make proof thereof. No proof, however, was made upon this point, but the trustees presented a reclaiming petition to the Court, praying to be relieved of the whole demand upon assigning to the creditors an adjudication they had obtained against Provost Saunders. The appellant states, that the interest of the creditors not being properly attended to, no answers were made to this petition, and the Court, on the 18th of February 1715, "sustained the said article of discharge, " the said trustees disposing the adjudication against Saunders in "favour of the creditors."

The trustees afterwards made proposals to end all the matter in dispute amicably by a submission; but this not taking effect, the appellant, on behalf of himself and the other creditors of Wilson of Littlefield (a), presented a petition to the Court, praying to have the cause re-heard, and the last mentioned interlocutor altered; but after answers, the Court, on the 29th of November 1719, refused the "desire of the petition;" and to this interlocutor the Court adhered on the 1st of December thereafter.

Entered,  
23 O8.  
2722.

The appeal was brought from "several interlocutory sentences " or decrees of the Lords of Session of the 18th of February 1715, the 29th of November, and 1st of December 1719."

#### *Heads of the Appellant's Argument.*

The trustees were appointed for the behoof of all the creditors, and were to have a considerable allowance for their encouragement, and consequently were to use exact diligence in recovering the debts due to Wilson, and to account for the same to the creditors.

The trustees regularly took out process against Provost Saunders on his bond for 2000 merks, and laid him in prison by a caption. He was afterwards set at liberty by the trustees, without any directions from the creditors. Saunders at that time was in very good circumstances, being possessed of a pretty good real estate, and of a personal estate of considerable value; and had he been detained in prison some time longer, and other proper methods then taken, the trustees might no doubt have recovered payment of the debt. The creditors, therefore, having lost this debt, which was the great fund of their payment, by the negligence of the trustees, the loss ought not to affect the creditors, but the respondents ought to stand charged with it.

The adjudication obtained by the trustees is an additional proof of their mismanagement; for that adjudication was not obtained till four years after he was dismissed out of prison, during all which time Saunders lived in good credit; but in February 1711, his affairs falling into disorder, the trustees adjudged his estate, after several other creditors had done the same, whereas if they had done it about the time he was set at liberty, the debt might probably have been paid.

(a) It does not appear how the appellant's right from the other creditors was constituted.



Counsel appearing for the appellant, but no counsel for the respondents, and the appellant's counsel being heard, *It is ordered and adjudged, that the interlocutory sentences or Decrees of the 18th of February 1715, the 29th of November and 1st of December 1719, complained of in the said appeal, be reversed; and that the interlocutor of the 29th of January 1715, be affirmed: and it is further ordered and adjudged, that the Lords of Session do proceed in the cause, in such manner as if the said interlocutors complained of had never been made.*

Judgment,  
31 Jan.  
1723-4.

For Appellant, - *Will. Hamilton.*

John Earl of Breadalbane, Sir James  
Sinclair of Dunbeath, and John Sinclair  
of Ulbster, Esq; - - - *Appellants;*  
Alexander Earl of Caithness, - - - *Respondent.*

Case 104.

20th March 1723-4.

*Reduction Improbation.*—In an action, where various objections were made to the pursuer's title, the Court having ordered production to be made, and afterwards granted certification; the judgment is reversed, and it is ordered that the defenders be not obliged to take a term for production, until the pursuer make out his title, upon which he founds his suit.

*Ujry.*

**I**N 1719, the respondent brought an action of reduction impro-  
bation against the appellants before the Court of Session, in  
which he insisted for production of the rights and titles by which  
the appellants held or claimed the lands of Ormly, Slebster, miln-  
lands and multures thereof, the towns and lands of Shanwell and  
Acharraskell, with the teinds and pertinents of the same; which  
had been part of the estate of Sir James Sinclair of Murkle, de-  
ceased. The circumstances of the case which gave rise to the  
action, as stated by the respondent, were:

That the respondent was the lineal descendant and heir of  
Sir James Sinclair of Murkle, who was heir of George late Earl  
of Caithness, who died without issue; so that all the estate of  
Caithness would, by the course of law, have come to the respon-  
dent, as well as the honours; but this Earl George was prevailed  
upon, without any valuable consideration, to make over his whole  
estate in Caithness to John late Earl of Breadalbane, deceased,  
the father of the appellant Earl John, subject indeed to a right  
of reversion not expressed in the deeds of conveyance, but in a  
separate deed, which was secreted, and which but lately came to  
the knowledge of the respondent:

That after the death of the said George Earl of Caithness, the  
said late Earl of Breadalbane possessed himself, not only of the  
whole estate of Caithness, which belonged to the said Earl George,  
but

but also of the lands of Ormly and other lands in Caithness, which were part of the estate of the said Sir James Sinclair of Murkle, under pretence that the said late Earl of Caithness was in possession of those lands as a creditor of the said Sir James Sinclair by a decree of apprising; and the Earl of Breadalbane also got possession of the writings of the family of Caithness, which occasioned complaints to the privy council of Scotland, and to the parliament of that country; and which had ever since been the subject of law suits, though the low circumstances of the Caithness family, and the minority of the present earl, hindered these disputes from being brought to an issue:

That the respondent claimed a right to the said lands of Ormly, &c. under a decree of apprising, obtained by John Murray of Pennyland, with sasine thereon, and which, after several mesne conveyances, was vested in the respondent: and some years ago, endeavours were used to settle differences between the respondent and the appellant the Earl of Breadalbane; but the other appellants, Sir James and John Sinclair, on purpose to prevent any agreement, in 1718 purchased the said lands of Ormly and others from the Earl of Breadalbane; but as the claims of the respondent were no secret, the Earl of Breadalbane was so cautious, as not to bind himself in warrandice of the purchase, but, on the contrary, the purchasers became bound to indemnify him.

To this action the appellants made defences; and the circumstances which gave rise to the action, as stated by them, were: That in October 1672, George late Earl of Caithness, by deed for a valuable consideration, conveyed to the late Earl of Breadalbane all the lands and estate in Caithness, particularly the lands of Ormly and others (before mentioned); in 1673 a charter of the premises was granted by the crown, upon which sasine was taken:

That part of these lands had formerly been the estate of Sir James Sinclair of Murkle, grandfather to the respondent; but being much encumbered, the several real securities affecting the same, which greatly exceeded the value of the estate, had been purchased by the said George Earl of Caithness, some time before the said sale, and these incumbrances were likewise assigned to the Earl of Breadalbane: and the respondent's father, by deed in 1677, reciting that his estate was under great encumbrances, and that the Earl of Breadalbane had right to the lands of Ormly and others part of the premises by apprisings and otherwise, therefore obliged himself, his heirs and successors, never to quarrel, question, or impugn his rights to the said lands:

That as the Earl of Caithness had been in quiet possession of the premises for several years before 1672, so the late Earl of Breadalbane, and the appellant the earl his son, had continued in quiet possession of the premises ever since; and in 1718, the earl, for a valuable consideration, sold the premises and all other his estates in Caithness to the appellants Sir James and John Sinclair:

That

That one John Murray, for a debt of the said Sir James Sinclair of Murkle, of 6000 merks Scots, in 1652 got a decree of apprising of the lands of Ormly and others, part of the premises, and likewise of other lands, part of the said Sir James Sinclair's estate, and thereupon took infeftment; but there being so many prior encumbrances upon that part of the estate conveyed to the Earl of Breadalbane, and of greater extent than the value of the lands, no possession was attained, by virtue of that decree, of any part of the premises conveyed to the Earl of Breadalbane; and the respondent having renounced to be heir to his father and grandfather, procured right to this old dormant apprising, and, under colour thereof, brought the present action.

The appellants in defence, at first, contended, that the right under which the respondent claimed was prescribed, no possession having been attained of any part of the lands in the possession of the appellants in 40 years after the date of the respondent's right; but the respondent offering, before the production of the deeds, to prove that several steps had been taken to prevent his claim from being prescribed, the Court, on the 2d of December 1720, "Found the allegation of prescription against the respondent's title, where the respondent offered to prove interruption during the running of the term to be assigned for production, could not stop the appellants taking a term to satisfy the production."

It was then insisted by the appellants, that the decree of apprising was usurious, as having been taken for compound interest, and that it was therefore null and void. But after answers for the respondent, the Court, on the 4th of January 1721, "re-pelled the objection proponed against the respondent's title, that the apprising is usurious, and found that the respondent's title is sufficient to oblige the appellants to take a day to produce the right called for."

It was next insisted, that the apprising under which the respondent claimed was led for a debt due by his grandfather, to whom he was heir apparent; that the respondent had been in possession of several of the lands contained in the apprising for a great many years, and that by his receipt of the rents the debt apprifed for was more than paid; and this the appellants offered to prove by the respondent's oath; and if this were so, they contended that the respondent had no right to oblige the appellants to produce any of the deeds. The Court, on the 11th of January 1721, "Found that the appellants' objection against the apprising which is the respondent's title in this process, that the respondent has been in the possession of the subject apprifed of such extent and for so long space as the free rents of the said subject intromitted with by the respondent, did exceed the sums in the apprising, is in this state of the process competent to be proved instantly by the respondent's oath." But the respondent having reclaimed, insisting that his possession of the lands contained in the apprising was not by virtue of this deed of apprising only, but by virtue of other rights and diligences in his person, and therefore

fore that his receipt of the rents was not to be imputed only to the satisfaction of the decree in question. After answers for the respondents, the Court, on the 7th of February 1721, "adhered " to their former interlocutor of the 11th of January 1721, with " this variation, that it be proved by the respondent's oath, whether his possession was by virtue of the aforesaid apprising." And the appellants having reclaimed, the Court, on the 18th of February, "adhered to their former interlocutors of the 11th of " January and 7th of February 1721."

The appellants were then directed to produce the deeds, and acts for the first and 2d term were pronounced, and they produced certain of the deeds called for; but not having made a complete progress of writs, the Court, on the 27th of December 1721, "granted certification against the appellants, and reduced " and improved the writs called for, and that for not production " and decerned."

The appellants against this interlocutor presented two petitions, one of them stating that certain witnesses had not been examined, and craving further time for that purpose; the other stating that the Earl of Breadalbane was in England, and there had been no opportunity to search his repositories, and praying that extracts might be stopped till the 1st of June next. The Court, after answers for the respondent, on the 31st of January 1722, "slept " extracting the decree of certification till the 15th of February " thereafter."

The appeal was brought from "several interlocutory sentences " of the Lords of Session of the 4th of January, the 7th and 18th " of February 1721, the 27th of December 1721, and 31st of " January 1722."

Entered,  
22 Feb.  
1721-2.

#### *Heads of the Appellants' Argument.*

A bare supposition that the respondent's title might not be prescribed, was not a sufficient reason to decree the appellants to produce the several titles under which they claimed. It had been much more just, when this objection was stated, to have considered that point first; for if it was with the appellants, there was then an end of the action; and to what purpose should the appellants be obliged to enter into an expensive action, and to produce their title deeds, when probably it may be found that the respondent, the pursuer, has no title at all. And though the interlocutors finding the appellants must take a term to produce their rights, proceed on the supposition that the respondent was before the same term to prove interruptions; yet the decree of certification is pronounced against the appellants without the respondent's having proved any of these supposed interruptions.

There is the less reason to indulge the respondent in this case, because he is the heir of the original debtor, and refuses to enter heir to him, and be subjected to his debts; but has purchased for a small sum this old dormant apprising, and would, under colour of that, defeat the appellants and others, who are just and lawful creditors of his predecessors: great care ought, then, to have been taken,

taken, that the title under which he claims should be clear and subject to no exception; because, if the appellants should be obliged to produce their title deeds, and that to a person who has no right, it may afford an opportunity to the heir to look into all the appellants' title deeds, which being apprisings, consist of many different particulars, and if, through the injury of time, or any other accident, any of them should be wanting, it may afford him a handle to overturn the most ancient settlements, and disappoint the payment of just creditors. As heir at law, he is not entitled to this, without subjecting himself to the payment of his predecessors' debts; if, therefore, an heir at law in the shape of a creditor make this demand, it ought first to be ascertained, that he is a really a true creditor, before he has this fruit by his action (a).

The appellants ought either to have been let into a proof of the respondent's possession, and receipt of the rents and profits of part of the lands mentioned in his apprising, in order to extinguish his demand, or otherwise he ought to have made oath upon that single point.

Nor can it alter the case, that the respondent pretended to have other titles, to the satisfaction of which he could impute his receipt of the rents; for these titles ought certainly to have been produced in order to satisfy the Court that they were of validity. Nor could it be sufficient for the respondent to make oath, that he had other titles, without obliging him to condescend upon and produce them, for that is admitting him to be judge for himself; and probably these other titles may be void too; and it is sufficient for the appellants to retain the possession they have, and likewise their deeds, till once the respondent shew, that he has a title to call theirs in question; and it is impossible to determine that before they be produced.

It would be hard that the appellants, Sir James and John Sinclair, because the other appellant the earl, from whom they purchased, was necessarily out of the kingdom, whereby they could not have an opportunity of searching for the papers that were wanting, should be for ever debarred from producing or making use of these deeds, which was the effect of the decree of certification, by which means the rights which they have as honest and just creditors, might be entirely frustrated.

#### *Heads of the Respondent's Argument.*

The rescription alleged by the appellants was interrupted, both by his minority and by several processess, which he immediately made appear in part by writings produced in this suit, and offered to bring a further proof, if necessary, against the time the appellants should produce their titles.

The objection made by the appellants, that the apprising was satisfied by receipt of rents, could not in form be proponed or

(a) The appellants also state the grounds on which they contended that the decree of apprising was usurious, and therefore null: the respondent gives a counter statement; but nothing can be given distinctly upon this point; these statements are therefore omitted.

insisted

insisted upon before the appellants produced their titles. The respondent was ready to make oath, if the appellants would be determined by his oath, whether or not the sums in the apprising were paid; but the objection, in the form it was proposed by the appellants, was insufficient in law; for although he should acknowledge he had possessed lands contained in the apprising, the profits of which, since his possession, might exceed the sums thereby decreed, yet that would be no proof that these sums were paid in satisfaction of that apprising, because he might and did possess those other lands by other titles than this apprising, which titles he would produce at a proper time, after the appellants had produced theirs. And after the interlocutors directing that this fact should be proved by the respondent's oath, at a calling of the cause on the 24th of February 1721, his counsel represented, that he was ready and willing to make oath upon the points referred to his oath; but the counsel for the appellants, who insisted to have his oath only to protract the suit, declared they did pass from his oath in that state of the process.

Judgment,  
20. March  
1723-4

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences complained of in the said appeal, except so much of the interlocutor of the 4th of January 1721, as relates to the objection made by the appellants to the apprising, under which the respondent claims upon pretence of its being usurious, and allowing too much interest, be reversed: and it is further ordered, that the Lords of Session, in the further progress of the cause, do not oblige the appellants to take a term for production, until the respondent, the pursuer below, shall have made out his title upon which he founds his suit.*

For Appellants, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*  
For Respondent, *Ro. Dundas. C. Talbot.*

The question upon the first appeal between Sir Hew Dalrymple and the Hon. Mrs. Fullarton, relative to the estate of Bargeny, 18 Dec. 1797, was upon a point very much like the present; and the judgment then pronounced was of the same import as that in the present case.

A similar judgment to this is given in a reduction improbatum brought by an heir, Duff of Braco and others v. Earl of Buchan, on appeal, 15 April 1725.

*Ex parte*

Alexander Murray, of Broughton, Esq; - *Appellant*; Case 105.  
 Captain James Butler, Nephew and Heir of  
 Sir George Maxwell of Orchardton, and  
 the Creditors of the said Sir George, - *Respondents*.  
 Kaim,  
 15 Dec.  
 1722.

21st March 1723-4.

*Solidum et pro rata.*—A debtor grants bond with a cautioner, and afterwards a bond of corroboration with a different cautioner; the money is paid by the cautioner in the corroboration; but he had only relief against the cautioner in the original bond for one half of the sum paid.

IN September 1674, Sir Alexander MacCulloch, and Godfrey his eldest son as principals, and Sir Robert Maxwell of Orchardton as cautioner, executed a bond to Alexander MacGhie for 2000 merks Scots.

After the death of Sir Alexander MacCulloch, the money not having been paid, the said Godfrey, then Sir Godfrey his son as principal, and Alexander Viscount of Kenmure, and Richard Murray of Broughton, (the appellant's father), as cautioners, in October 1679, executed a bond of corroboration to the said Alexander MacGhie, reciting the original bond, and that the creditor was contented to delay payment upon granting to him such corroborative security: therefore the said principal and cautioners, in further corroboration of the said bond, and without hurt or prejudice thereto, or derogation therefrom in any sort, *sed accumulando jura jurius*, bound and obliged themselves to make payment of the said principal sum, with interest from Martinmas 1679, and this bond of corroboration contained an obligation from the principal to the cautioners for their relief and indemnity.

The money not being paid, the creditor brought his action before the Court of Session, against the appellant as son and heir to the said Richard Murray; and the appellant was decreed to pay the principal sum and interest, for which his father had become security. The creditor in the said bonds thereupon assigned the same to him for his relief against the other persons bound.

The appellant brought his action before the Court of Session, for payment of the said sum of 2000 merks Scots, and interest contained in the original bond; to which action the respondent Butler, and some of the creditors of Sir George Maxwell, son and heir of Sir Robert Maxwell, the cautioner in the original bond, became parties. In this action the appellant contended, that he was cautioner or security for the payment of the money due by the original bond, and that as to him, all the persons bound therein were principals; and he having paid the money, was entitled to relief, and to recover his payment from all or any

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of the said persons. On the part of the respondents, it was answered, that Sir Robert Maxwell was only a cautioner, and that the appellant's father could only have relief of the one half of the sum he had paid, as he was equally bound for the debt.

The Lord Ordinary, on the 29<sup>th</sup> of November 1721, "Found that the appellant could only have relief for the half of the sum he had paid to the creditor." And to this interlocutor the Court adhered on the 15<sup>th</sup> of December 1722, and 18<sup>th</sup> of June 1723.

Entered,  
21 J.n.  
1723-4.

The appeal was brought from "an interlocutor of the Lord Newhall, Ordinary, of the 29<sup>th</sup> of November 1721, and the affirmances thereof by the Lords of Session the 15<sup>th</sup> of December 1722, and 18<sup>th</sup> of June 1723."

*Heads of the Appellant's Argument.*

The very title of the bond of corroboration, as well as the stile, expresse the mind and intention of the parties contracting to have been, and the terms under which they became bound import, that it is granted to the creditor as a further security of the former bond. The principal and cautioners in the first bond became all as principals with regard to the persons bound as cautioners in the corroboration, who thereby became cautioners to the creditor for them. The first bond continued to all intents and purposes the same as before; and the bond of corroboration was only given as a further security to the creditor, in case the principals and cautioners in the first bond should become insolvent. But in case the creditor should compel the cautioners in the bond of corroboration to pay the debt, then they were to be relieved by the persons for whom they were bound as cautioners, both principals and cautioners in the original bond being bound for their relief. It is certain, that if the cautioners in the first bond had paid the debt, they could only have taken an assignment for their relief against the principals, and could never have had access against the persons bound in the corroboration, who were only cautioners for them. Had the appellant, when he paid the bond, taken any assignment in the name of a third party, the respondent the heir must then, without question, have paid the debt, and had relief only from the principals, for whom his ancestor was cautioner. So the Court had found in parallel cases, particularly *Clarkson against Edgar*, 1<sup>st</sup> December 1703, and *Brock against Lord Bargeny*, 14<sup>th</sup> February 1705. This is agreeable both to law and equity; for the bond of corroboration was a transaction directly with the creditor, and only for his advantage, without the least intention of any alteration in the first bond, or benefit to the parties bound in it, except to procure from the creditor a larger time for them to pay the debt.

Judgment,  
21 March  
1723-4.

This day having been appointed for hearing the cause *Ex parte*,

Counsel for the appellant only attending, they were called in and heard, and withdrew; and after due consideration and debate had of the merits of this cause,



*It is ordered and adjudged, that the petition and appeal be dismissed, and that the said interlocutor, and affirmances thereof, therein complained of, be affirmed.*

For Appellant, *Dun. Forbes. Will. Hamilton.*

Charlotta, Marchioness Dowager of Annandale,

*Appellant;*

Case 106.

James, Marquis of Annandale, John Baillie, Francis Holliday, and many others, claiming to be Creditors of William, late Marquis of Annandale, deceased,

*Respondents.*

21st March 1723-4.

*Forum competens—Jurisdiction.*—The Marchioness of Annandale, residing in England, being appointed executrix for behoof of her children, proves the late Marquis's will in England: various personal creditors of the late Marquis, arrest in the tenants' hands, a jointure payable to the executrix out of the Scots estates: the Court of Session having ordered her to purge the arrestments, before she drew her jointure: the judgment is reversed, and it is ordered that the arrestments be loosed without caution or consignation.

**A**FTER the determination of the appeal relative to the jointure or life-rent of 1000*l.* sterling, between the appellant, and the respondent the marquis, on the 15th of December 1722, the appellant returned to the Court of Session to have that judgment of the House of Lords applied in her favour. What arose out of the proceedings had thereupon gave rise to the present appeal.

The late marquis, by a will executed on the 29th of December 1720, but a short time before his death, nominated the appellant his executrix and universal legatee in trust for the behoof of their son Lord George, then born, and of any other children that might be procreated between him and the appellant, with a proviso, that the appellant's right of administration should continue only during her widowhood, and after her marriage devolve upon such persons as he should appoint for the sole use of his said children; and it was also declared, that the executrix should be bound to pay all his lawful executry and personal debts, in which Lord Johnstone, his eldest son, was not bound, and which were contracted since the 1st of April 1690, the date of his tailzie. The appellant proved this will in the prerogative court of Canterbury, and possessed herself of the testator's personal estate to a considerable amount. Several of the respondents, stating themselves to be creditors of the testator for debts contracted in Scotland, since April 1690, exhibited their bill in the Court of Chancery against the appellant for discovery of assets, and satisfaction of their claims. To this bill the appellant put in her answer; and afterwards filed a cross bill against the present marquis

marquis and the plaintiffs in the original bill, for a discovery of the reality of their debts.

In this state matters were when the appellant, in terms of the said judgment of the House of Lords, 15th December 1722, applied by petition to the Court of Session, to have proper diligences directed for payment of the arrears of her annuity of 1000*l.* with interest, and of the future payments, yearly and termly as they should fall due. This petition was remitted to the Lord Ordinary, to hear parties thereupon; and before him the counsel for the present marquis, stated, that the arrears of the life rent were arrested in his hands by several persons claiming to be creditors of the appellant, as executrix of her late husband for large sums of money. The Lord Ordinary gave a decree for pointing of the ground, until the appellant should be paid off her life-rent annuity in terms of the order and decree of the House of Lords; but "superfeded extract until the said arrestments were purged."

The appellant reclaimed to the Court, stating, that she had proved the will in England only, and possessed the assets in that country, and never intromitted with any of the effects of the late marquis in Scotland, where the present marquis had been confirmed executor to his father, and had taken possession of the personal estate; and insisting that she was not liable to account in Scotland for the English assets; and that her life-rent annuity ought not to be stopped by these arrestments; and therefore praying that the arrestments might be loosed without caution or consignation. The marquis and the creditors made answer, and the Court, on the 13th of February 1722-3, "adhered to the interlocutor of the Lord Ordinary, and refused the desire of the petition."

The appellant afterwards brought an action before the Court of Session against the said arrestors, and all the other creditors of her late husband whom she could discover, for reducing the arrestments, and concluding that it should be declared, that her said life-rent annuity was not arrestable at the suit of any creditor of the late marquis, nor the appellant as executrix in trust for her children liable to be sued, or to account in any court in Scotland for the personal estate come to her hands in England. To this action the creditors made defences; and the Court, upon hearing the cause, on the 26th of December 1723, "sustained the defences made for the defenders, and found the arrestments on the dependance sufficiently warranted."

Entered,  
21 Jan.  
1723-4.

The appeal was brought from "two interlocutors of the Lords of Session of the 13th of February 1722-3, and 26th of December thereafter."

#### *Heads of the Appellant's Argument.*

All executors, especially those in trust, ought to be sued, either in the country where they reside, or where the estate, which is the subject of their administration, lies, and where the will is proved. The appellant has no residence in Scotland; she only proved the will and possessed the estate in England; she ought

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not therefore to be sued to account for that estate in any court of Scotland.

Although by the course of proceedings in Scotland, a creditor suing his debtor for his own proper debt, may arrest such debtor's own effects: yet it cannot be maintained, that the proper effects of an executor, or what he has in his own right, can be arrested upon a pending suit for the debt of the testator; at least not till such debt can be established, and a judgment recovered, finding the executor has effects sufficient to answer the defunct's debt. Were this otherwise, an executor might by arrestments be deprived of the use of every part of his own estate, till he had accounted with every single creditor, and that possibly in successive suits for the effects of the deceased, which in the appellant's case would be almost endless.

The creditors themselves appear convinced that Lord George and Lord John Johnstone, the appellant's sons, ought to be made parties in any suit carried on against her for her accounting for her late husband's effects, and have named them accordingly as parties in the suits below: but since her sons have neither residence nor estate in Scotland, and cannot be sued in that country, no suit can be carried on there against the appellant, to which they must necessarily be parties (a).

Since the appellant cannot be lawfully sued to account in Scotland, her jointure cannot be arrested on pretence of any such pending suit, which never can be lawfully brought to an issue.

If such proceedings be allowed, and the said decrees be affirmed, the appellant may be sued by multitudes of creditors both in England and in Scotland, to answer to each of them the same sums, which might produce directly contrary decrees, not only the jurisdictions, but the rules of administering personal estates, being entirely different in the two kingdoms. By these means, the appellant might be decreed, without remedy, to pay the same assets and effects, to two different persons, and without a possibility of bringing the different claimants into a court having a jurisdiction over both parties; and in the mean time her jointure must remain perpetually arrested, or she must submit to pay the same sums twice over.

The appellant in the mean time has by these arrestments been kept out of her jointure above three years, been harassed with many suits, and left destitute of any means of subsistence. By her answer to the bill Chancery, it appears that the whole personal estate come to her hands amounts only to 4778*l.* 9*s.* 9*d.* Out of this she has paid 2316*l.* 18*s.* 10*d.* and she is sued for a debt on bond of 2000*l.* of principal besides interest.

#### *Heads of the Respondents' Argument.*

By the law of nations, wherever a person or his effects are found, they are subject to the laws of the country; and by the

(a) One of these sons became afterwards Marquis of Annandale, and in a decree pronounced by the Court of Chancery (in the important question with regard to his domicile) it was found that he was originally domiciliated in England.

undoubted law of Scotland, any creditor may arrest the effects of his debtor or of any one against whom he has commenced an action. If an executor apply assets towards paying the debts of his testator wheresoever they are due, it will be a discharge to him wheresoever he is to account. In Scotland actions are daily brought against persons living out of the kingdom, and their effects arrested upon such actions; but those arrestments are always loosed upon finding surety to answer to the value of the thing arrested, in case the defender be cast in the action: By the law of Scotland, all pleas and defences competent to the defender are entirely reserved to him against the action, in like manner as is practised in England, where a person is arrested before proof made of the debt.

It matters not, whether the appellant be executrix for her own benefit, or for that of the children, because the creditors are to be discharged before any legacies be paid; and in case she had applied any part of the assets to the use of her children before paying the debts, she would be obliged by the laws of all nations, as well as those of England and Scotland, to answer the same out of her own estate.

The creditors, who contracted with the late marquis in Scotland, are most solicitous to carry on their suits in their own country, where the forms are short and the expences small; and they demand no more than that the appellant account for what remains of the personal estate in her hands, not already applied to the payment of debts.

The condition of the creditors would be extremely hard, if they were to be disappointed of this fund of the personal estate which is allotted by the testator for their payment, for the creditors can have no recourse against the present marquis upon the real estate, which he possesses by virtue of an entail in 1690, prior to their debts, which therefore cannot be charged upon him, and which was the reason which moved the late marquis to make this express provision for them in his will out of his personal estate.

Judgment,  
21 March,  
1723-4.

After hearing counsel, *It is ordered and adjudged, that so much of the said interlocutor of the 13th of February 1722-3, and of a former interlocutor thereby referred to, as supercedes extract of the decree for distress, till the arrestments be purged, and also the said interlocutor of the 26th of December 1723, be reversed; and it is further ordered that the decree for poinding of the ground be forthwith given out by the proper officer, and put to execution, and that the arrestments in question be loosed without caution or consignation, and that the Lords of Session do give such further directions as shall be just pursuant to this order.*

For Appellant,	P. Yorke.	Ro. Dundas.
For Respondents,	C. Talbot.	Dun. Forbes.

Colonel Francis Charteris, of Ampsfeld, - *Appellant*; Case 107.

The Right Honourable James Earl of  
Hyndford, - - - - - *Respondent*.

23d March 1723-4.

*Usury*—*South Sea Company*.—During the rapid rising of South Sea stock, an agreement was entered into, on a Sunday, to sell a certain quantity of stock, at 90 per cent. above the price of the preceding day, the price not to be payable till a year after transfer of the stock; and an heritable bond was afterwards granted in consequence of the transfer, for payment of the agreed price on a day certain: this bond being reduced on the head of usury, the judgment is reversed.

*Witness*.—In a reduction on the head of usury, a menial servant of the defender who was a subscribing witness to an agreement, being refused to be examined, the judgment is reversed.

The grantee in a bond having proposed to examine a cautioner therein as a witness, with regard to the transaction for which the bond was granted, consenting that what he deposed to should not be of prejudice to him, the Court refused to admit him, but the judgment is reversed.

*Appeal*.—Interlocutors reversed, and an agreement adjudged of consent.

ON Sunday the 27th of March 1720, a verbal agreement was entered into between the appellant and respondent, for the purchase of 5000*l.* South Sea stock; the appellant agreed to sell at the rate of 4*1*/<sub>10</sub> per cent, which was considerably above the market-price of the day before; but the price was not to be payable by the respondent for the space of a twelvemonth afterwards. The next day a written agreement was executed by the parties, witnessed by the writer of it, and John Gourlay one of the appellant's servants, which was to this effect, that the appellant should transfer to the respondent 5000*l.* South Sea stock; the respondent delivering to the appellant the bond after-mentioned, at the South Sea House, upon Wednesday then next; that the respondent as principal, and Sir John Anstruther as cautioner for him, should in consideration thereof, make and deliver to the appellant an heritable bond for 20,500*l.* sterling, over their estates in Scotland, payable the 28th of March 1721, with interest after the day of payment; and each party bound himself to perform to the other under the penalty of 5000*l.* sterling.

In pursuance of this agreement, the appellant transferred the stock to the respondent on the 30th of March, and the respondent delivered to the appellant an heritable bond dated same day, whereby the respondent and Sir John Anstruther acknowledge to have borrowed and received from the appellant 20,500*l.* sterling, which the respondent as principal, and Sir John Anstruther as cautioner bound themselves conjunctly and severally to re-pay betwixt and the 28th of March 1721, with interest from and after the term of payment.

Some short time afterwards the price of South Sea stock rose to an immense height. But after the total fall of stock, when the term of payment of the said bond was arrived, the appellant was

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obliged

12 Ann.  
c. 16. s. 2.

obliged to arrest the rents of the estates of the respondent in the hands of his tenants, and bring an action on the said bond before the Court of Session. The respondent brought his counter-action against the appellant for reducing the said bond upon the head of usury, libelling upon the act of parliament, 12 Ann c. 16. s. 2. and stating as the ground of this counter-action, that 410 per cent, which was the rate at which the purchase was made, exceeded the common price of stock at that time about 90 per cent; and that this advanced price was given for forbearance of payment of the principal money for one year; and that therefore the bond was void. These two actions were conjoined.

When this action came first to be argued before the Lord Ordinary, his lordship, on the 21st of July 1721, "before answer  
" allowed both parties to prove at what price South Sea stock  
" was bought and sold on the 28th of March 1720, and what  
" was the communing and agreement between the parties; and  
" the respondent to prove that the appellant had since the date of  
" the agreement and bond declared that the addition to the current price of stock upon the 28th of March 1720, was made  
" for the forbearance, and because the respondent wanted ready  
" money; and the appellant to prove, that the respondent disposed of what he so purchased at cent. per cent. profit or to a  
" great advantage." And to this interlocutor the Court adhered on the 29th of July, and by another interlocutor of same date, "Found, that any expression in communings betwixt the respondent, or any other acting for him in his name, and the appellant, in reference to the agreement at the time of the bargain making, or before or after, might be proved by the respondent, by the persons present at those communings; but that no proof was to be allowed as to any expressions at other times and on other occasions." On the 28th of November 1721, the Court "adhered to their former interlocutors, with this addition, viz. that the appellant be allowed to prove, that at the making the transfer of the stock, or at the date of the bond, he offered the respondent 500*l.* or some other considerable sum for his quitting the bargain, and that the said offer was refused by the respondents."

A list of witnesses was given into court by both parties, and among those for the appellant were the names of Sir John Anstruther, and John Gourlay, his (the appellant's) servant, who was a subscribing witness to the articles of agreement. The respondent objected to the admissibility of Gourlay, as being the appellant's servant, and the Court, on the 13th of February 1722, "sustained this objection against Gourlay."

Several witnesses were examined; among others for the respondent, Lord Forrester deponed, That he was present at the communing relative to the sale of the 5000*l.* stock on Sunday the 27th March 1720; that the appellant demanded 420 per cent. and the legal interest, and the respondent offered 400*l.*, and by the deponent's advice agreed to give 410*l.*, and that he remembered this agreed price was about 90 per cent, above the current price

price at the time ; that it was expressly communed between the parties, that the consideration above the then current price was to be given for the forbearance of payment for a year ; and it was reckoned among them how much the premium for forbearance of payment amounted to, but does not remember whether the appellant or respondent made the reckoning, but the deponent himself made the reckoning in their presence. That there passed something about the extraordinary advantages that might be had for the use of money at the time, and that the exchange from Scotland was then very high, and that these were made use of for inducing the respondent to make the bargain ; but does not remember that the appellant said these things, but that they were said in the communing.

Lord Forrester, on his cross examination, deponed, that there was no agreement to give so much money as the current price of stock, and by a separate bargain to give so much more for the delay of payment, but the whole was in one bargain. That the appellant insisted for interest from the date of the bond, but was afterwards satisfied with the 4 10/. per cent. in full.

Patrick Macdowall, who prepared the agreement between the parties, and the subsequent heritable bond, deponed, that when the bond was signed, the appellant told the respondent that he was still ready to depart from the agreement ; to which the respondent answered he would keep his bargain. The appellant told the respondent he would give him 20 or 30 guineas, or some such sum to give up the bargain, but the respondent answered he would not quit it for 500/.

Colonel Middleton, who had entered into a similar transaction with Sir John Anstruther, in which the respondent was cautioner, deponed, that Sir John had told the deponent that he thought it wrong and in vain in the respondent to dispute his bargain with the appellant ; and that he was resolved to have no disputes with the deponent about their bargain ; and had since paid deponent 900/. of the principal sum.

Some other witnesses proved that about the time of this transaction there were great variations in the price of South Sea stock, within the compass of a day or two ; particularly that between the Saturday and Monday immediately preceding stock rose 95/. per cent. The appellant likewise produced an account taken from the South Sea books, by which it appeared, that the respondent had borrowed of the Company 26,820/. upon stock and subscriptions.

On the 16th of July 1723 the Court pronounced this interlocutor ; " Having considered the state of the process, writs produced, and the testimony of the witnesses adduced, and debate thereon, found that the minute of agreement, and bond granted in pursuance thereof, are usurious, and therefore reduce the same." And to this interlocutor the Court adhered on the 30th of same month.

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the appellant having also petitioned the Court, praying again that Sir John Anstruther might be examined, the Court, on said 30th of July 1723, "refused the desire of his petition."

Entered,  
21 Jan.  
1723-4.

The appeal was brought from "several interlocutory orders" and decrees of the Court of Session of the 21st and 29th of "July, and 28th of November 1721, the 13th of February 1722, "and 16th of July 1723, and two other interlocutors of the "30th of the same month."

*Heads of the Appellant's Argument.*

As to Sir John Anstruther and Gourlay the witnesses refused by the Court to be examined, though Sir John might not be produced as a witness for the respondent, yet he ought to be examined at the instance of the appellant, who consented that whatever he deposed should not be made use of against himself. And though Gourlay was the appellant's servant, yet being a subscribing witness to the bond, the appellant had a right to his testimony.

In this case there was no loan of money or any thing else, but an absolute sale and transfer of stock, in the nature of a time bargain for which a certain gross sum was to be paid at the distance of a year, without any interest. Lord Forrester indeed says that he remembers the agreed price was about 90*l.* per cent. above the *current* price at the time, and that it was expressly communed between the parties, that the consideration above the then current price was agreed to be given for the forbearance of the payment of the price for one year: now it is most certain that there was no *current* price at the *time*, for the time was upon a Sunday, and therefore his lordship was at liberty to reckon it at what rate he pleased. But he could not be sure, that his notion of the price of stock was within 90*l.* per cent. of other people's notions of it, and the only mode he could have of reckoning the price of stock at the time was notional and imaginary; and it might as well have differed 95*l.* per cent. between the Saturday night and Monday morning when the agreement was put in writing, as it did between the Saturday and Monday before. But it manifestly appears that a premium for forbearance of the payment of the price was not reckoned by any body but Lord Forrester; for he swears there was but one bargain, and one agreement for the price, and since no more is given but *that agreed price*, it is not easy to conceive how it could be agreed to give any consideration for forbearance of the payment of that price: there must either have been two separate bargains, first to give a price and then so much for forbearance of payment of that price, which his lordship denies, or there could be nothing given for forbearance of payment. The appellant also proved, that Lord Forrester had made contracts to accept of 10,300*l.* South Sea stock at 56,950*l.* But though his lordship's evidence had been full in point, yet by the law of Scotland one witness is not sufficient.

Sir



Sir John Anstruther has paid part of the money, and makes no scruple of paying the rest upon his bond, wherein the respondent is bound as his security to Colonel Middleton, which was given upon a bargain made by the appellant with Sir John for 1000*l.* South Sea stock, upon the very same terms as this agreement was made with the respondent.

*Heads of the Respondent's Argument.*

With regard to Sir John Anstruther, the application to have him examined was made not only after issue joined, but after the proof was concluded, and both parties circumduced from bringing further proof. Besides Sir John was surety in the bond, and a party in the suit, and so was not a proper evidence in this case, unless the appellant would have put the whole issue upon his oath, according to the law of Scotland, which the appellant refused to do. With regard to Gourlay; by the law of Scotland no menial servant can be examined for his master, being supposed to be under influence, and the appellant opened nothing material, that he intended his servant should be examined to.

This was not a naked sale of stock, but at worst a loan intermixed with and adjected to a sale, the stock was transferred, the value of it lent, or which is the same thing, a forbearance of payment of it given for a year, and a high interest exacted on that account. The circumstances of the case make it plain, that the loan or credit given for the money, was the principal if not the only thing that brought the respondent into the bargain with the appellant; for if a sale and purchase only had been intended, the respondent must have purchased from another at the difference of 90*l.* per cent cheaper.

The appellant contended that the money given above the current price, was given for the hopes of gain by the rise of stock; but this is impossible, for if the respondent had purchased from any other person at the current price, he would have had better prospect of gain by the rise of stock. It is plainly proved that the forbearance of payment for one year, was commuted upon as the consideration for which the advanced sum above the current price was given, and that it was calculated how much it came to in the way of interest.

It is proved that stock had a certain current value on the day the bargain was concluded, viz. from 316*l.* to 320*l.* per cent. And it is proved, that the bargain proceeded upon the footing and supposition, that that was the current price of stock; and consequently the advanced sum covenanted to be paid, was according to the intention of parties at the time for some other cause than the value of stock, which could only be the forbearance.

There is no resemblance between a time bargain and the contract in question. In a time bargain, nothing is transferred to the buyer, nothing is lent to him, no use of money nor value of merchandize is given him, there is no forbearance of payment; and therefore usury cannot take place in such a bargain. The chance

is equal both on the side of the buyer and seller. In a time bargain, the value of stock is not to be computed as at the time of the contract, but at the time of implementing it; for till then, there is neither sale nor loan, but a personal obligation on the one side to deliver, and on the other to receive and pay: it may happen, that the seller has no stock on the day of the bargain, and is forced to buy it at a high price on the day of the delivery.

Judgment,  
23 March  
1723 4.

After hearing counsel, the counsel for the appellant having informed the House, "that the appellant had that regard to the respondent and the loss sustained by him in the stocks, that he would consent that the bond and infestment in question, though found good by the House should be restricted to the sum of 11,000*l.* payable at Martinmas next, with interest from this day, and to the further sum of 2000*l.* by way of penalty over and above the said 11,000*l.* and interest from this day, in case the said 11,000*l.* and interest be not paid at the day aforementioned," and the appellant being present in person declared his consent thereto to the House; *It is ordered and adjudged that the several interlocutory orders and decrees complained of in the said appeal be reversed; and in regard of the appellant's consent above-mentioned, it is further ordered, that all further proceedings be stayed upon the said bond and infestment till Martinmas next; and in case the sum of 11,000*l.* sterling with interest from this day be then paid to the appellant, or his order, that from thenceforth the said bond and infestment shall be esteemed to be fully satisfied and discharged, and shall be delivered up and vacated in due form of law; and in default of payment of the said 11,000*l.* with interest from this day, at the time aforesaid, the said bond and infestment shall be restricted to the said sum of 11,000*l.* and interest, and the further sum of 2000*l.* in name of penalty; and the appellant shall be at liberty thenceforth to pursue and carry on his suit upon the said bond and infestment, under the restrictions aforesaid, in the same manner as if no stay of proceedings had been ordered, and upon his recovering and being paid the said sum of 11,000*l.* and interest from this day, and the said penalty of 2000*l.*, the said bond and infestment shall thenceforth be esteemed fully satisfied and discharged, and shall be delivered up or vacated in due form of law.*

For Appellant, *Dun. Forbes. C. Talbot. Will. Hamilton.*  
For Respondent, *Ro. Dundas. C. Wearg.*

This decision is in some degree interesting, as relating to the appellant, the famous Colonel Charteris. His conduct at the hearing of the appeal is certainly not of a piece with many things alleged against him on all quarters; he there gave up to the respondent a very large sum of money, which would have been his, if the interlocutors had been simply reversed, which they would probably have been.

The witness Gourlay was also famous in his day.

George Munro, of Culcairn, and Captain  
 Donald Macneil - - - - - *Appellants; Case 108.*  
 Kenneth Mackenzie, of Auchtiedonald, and  
 Others - - - - - *Respondents.*

31st March 1724.

*Costs and Expenses* — One of the defenders in a spuilzie, who was an officer in the king's service during the rebellion, being assoltied, petitions for his expence, which are refused by the Court, but the judgment is reversed upon appeal, and the Court is ordered to tax and ascertain his costs.

*Witness* — In a spuilzie brought against the leader of a party, on the king's side during the rebellion, persons belonging to that party were valid witnesses for the defender.

*Spuilzie* — The Court having found the leader of said party liable in damages, without hearing him upon the relevancy; their judgment is reversed, and they are ordered to hear the defender on the relevancy.

**T**HE appellant, Munro, being a deputy lieutenant in several counties, and sheriff depute of Ross-shire, was very active on the side of government at the time of the rebellion: The appellant, Macneil, was a captain in the well affected militia. On the 20th of April, 1716, the Earl of Cadogan, then commander in chief in Scotland, did, by his order, direct the appellant, George Munro, to use his utmost endeavours to seize and apprehend forthwith all gentlemen and heritors in the country, belonging to the Earl of Seaforth, and in the shires of Ross and Cromarty, who had been in the rebellion; and send them prisoners to Inverness; and the commanding officer of that garrison was by the same order directed to give him such detachments of the troops as he should judge necessary. By another order of the 23d of same month, the said Earl directed both the appellants to use their utmost endeavours to discover and apprehend all such persons as had been in the rebellion, and to send them prisoners to such of His Majesty's garrisons as should be nearest the place where they might happen to be taken up. In consequence of these orders, the appellants proceeded to the Earl of Seaforth's country, and took several steps against persons who were in arms. The respondent, Mackenzie, and his father, now deceased, being absent from their houses, the appellants resided in them for some days; and the conduct of them, and the party under their command, during these days, became the subject of the following action.

The respondent's father, in October 1721, brought an action of spuilzie before the Court of Session, in his own name, and in the names of his son and of their tenants, against the appellants. This action stated that the appellants did, in a violent manner, take possession of the respondent's father's house, and after having lived there with their whole party for several days, without paying for any thing, did, when they went away, plunder the said house

house of all the furniture and goods therein, and carried off all the horses, cows, sheep, goats, &c. they could find upon the lands belonging to the respondent's father. And in a week or two after, the said party came to the respondent's house in Lochbroom, and not only plundered and carried off all the goods they could find, but also burned and destroyed several houses: That the respondent's father had always behaved himself as a good and faithful subject to His Majesty's government, and was at the time of committing these violences, attending the lord lieutenant of the county.

This cause coming to be heard, the Lord Ordinary, on the 8th of March, 1722, "restricted the libel to restitution and damages, and before answer allowed the pursuer to prove the same, " and the defenders' accession to the taking away of the goods " libelled *prout de jure*; and the defenders to instruct that they " had a legal warrant and power for marching troops through " the country where the pursuer lived, to oblige the inhabitants " of that country to deliver up their arms, *scripto*, and assigned " the first day of June for proving and producing *ut supra*."

Sundry witnesses were examined on the part of the pursuer, who proved sundry articles of spuilzie; but on the part of the appellants, the said orders of the commander in chief were produced, without examining any witnesses: The term was therefore circumduced against them on the 6th of June, 1722.

They afterwards presented a petition to the Court for leave to examine witnesses, to prove that the cattle and goods, which had been taken away, were afterwards restored; to this request the pursuer conditionally agreed, and the Court, on the 16th of June, 1722, " granted diligence for proving, that the said goods " alleged spuilzied were restored to, and recovered by the pro- " prietors, with this quality, that it should not stop advising the " pursuer's probation."

On the 14th of November, 1722, the Court having taken into consideration the proof for the pursuers, of that date pronounced an interlocutor, by which they " found it proven, that the appel- " lant, George Munro, with a party of armed men, took up free " quarters in the pursuer, Kenneth Mackenzie's house; that he " and his party carried away a great many horses, cows, sheep, " goats, and other goods belonging to the said Kenneth Macken- " zie; and also that the said appellant, with his party, carried " away a great many cows, &c. from the lands of Lochbroom, " belonging to the respondent, Kenneth Mackenzie," (the values of most of which were stated as proved.) " And found that the " said appellant, with his party, did burn nine houses belonging " to the tenants of the pursuer, and that the goods therein were " partly thrown into the fire, and partly carried off by the party. " And ordered the pursuer to give in a condescendence of " the values of such of the aforesaid goods, whereof the values " were not proved; as also the value of the houses and " goods that were burnt, and assilzied the appellant, Captain " Macneil."

Several

Several witnesses having been summoned to give evidence of the restitution of the goods, particularly a Mr. Gordon, who deponed to the restitution of part of them, the appellant, Munro, proposed to examine several persons who had been of his party, to have proved further as to the restitution, particularly William Munro, of Altas; but the respondent having objected to this Munro that, having been of the party, he could not be examined as a witness, the Court, on the 15th of November, 1722, "sustained the objection against the said William Munro, and found he could not be received as a witness in the cause."

The appellant Munro reclaimed against the last-mentioned interlocutors, but after answers for the pursuer the Court, on the 4th of December, 1722, "of consent of the pursuer, found the appellant, Munro, was not liable for the goods contained in Mr. Gordon's oath, and adhered to the former interlocutor as to all the other goods, and remitted to the Lord Ordinary to proceed accordingly." And to this interlocutor the Court adhered on the 26th of December, 1722.

On returning to the Lord Ordinary, his Lordship, on the 5th of January, 1723, "settled the value of the deductions conform to Robert Gordon's deposition, and the other proofs in the cause." And on the 15th of same month, his lordship "found that after these deductions there remained due of the values of the goods so found proved the sum of 3215*l.* 17*s.* 4*d.* Scots, or 267*l.* 19*s.* 9*d.* sterling, for which decerned against the appellant, Munro; and also having considered the condescendence given in by the pursuer of the values of the other goods found proved to have been spuilzied, and whereof the values were not found fully proved, amounting by the said condescendence to 760*l.* 6*s.* 8*d.* Scots, or 63*l.* 13*s.* 4*d.* sterling, and that the appellant, Munro, had made no objection against the same; therefore sustained the values as stated in the said condescendence, and decerned likewise against the appellant therefore."

The appellant, Munro, having given in a representation to the Lord Ordinary, praying his lordship would give him a hearing as to the relevancy, and to find that the condescendence of itself was no sufficient proof; his lordship, on the 18th of January, 1723, "refused the desire of the said petition in so far as concerned the consideration of the relevancy of the libel, the same having been determined in the Inner House, at least not remitted to the Ordinary; but as to the other particulars concerning the values in the condescendence, declared he would hear parties thereon." Parties were heard accordingly, and the Lord Ordinary, on the 23d of January, "restricted the values of certain particulars in the condescendence, and allowed the decret to be extracted for these sums, and the other sums decerned for."

Against these interlocutors of the Lord Ordinary the appellant, Munro, presented two several reclaiming petitions to the Court, which

which were refused upon the 13th and 19th of February, 1723.

The appellant Macneil presented a petition to the Court, setting forth that he had been put to considerable expences by the said action of spuilzie, from which he had been absolved, and he gave in an account of 264*l.* 18*s.* 4*d.* Scots, of expences which he claimed, together with a further sum of 60*l.* Scots, for extracting the decree; but on the 28th of February, 1723, the Court "refused the desire of the petition."

Entered,  
15 Jan.  
1723-4-

The appellant, Munro, brought his appeal from "several interlocutors of the Lords of Session of the 14th and 15th of November, 1722, and that part of the interlocutor of the 4th of December following, affirming their former interlocutors, and the interlocutors of the 26th of the said month of December, the 5th, 15th, 18th, and 23d of January, 1723, and the 13th and 19th days of February following."

And the appellant, Macneil, brought his appeal from "the interlocutor of the 28th of February, 1723, refusing him his costs."

The pursuer, in the original action having died, the appeal was transferred against the respondent, Mackenzie, his son.

#### *Argument of the Appellant Munro.*

This appellant was acting for His Majesty's service, in pursuance of an order from the general for that purpose; and if any of the persons then under his command committed disorders, or took away some things unknown to him, it were very hard to make that a charge against him. When he came there with a lawful command for the service of government, no evil ought to be imputed to him, except what was done with his own hand, or by his special order; but nothing of that was pretended, nor did any of the things, or of their value, come to his possession.

The Court proceeded to take the proof brought by the pursuer under consideration, and to give judgment upon it, before they heard the evidence brought by the appellants, though by their interlocutor of the 16th of June, they allowed that evidence to be brought. And when it appeared by the evidence of Robert Gordon, that all the goods that were in the hands of the militia were restored, whereby a further proof of the particular quantities became necessary, the Court was pleased to disallow the appellant to bring any further proof.

The appellant conceives it was no good objection against Mr. Munro, of Altas, being a witness, that he was one of the party under the appellant's command. On the contrary, those of that party were the most proper witnesses to prove facts that they saw, and in the event of which they could neither gain nor lose. And since the Court were of opinion, that those of the appellant's party were not proper witnesses, they ought to have allowed him

him to examine other witnesses as to the restitution; and had that liberty been indulged to the appellant, he could have proved that every individual thing was restored; so that he is decreed to pay for what the respondents have in their own possession.

If the appellant must be accountable, the value of the goods ought to be ascertained by witnesses; but he is decreed to pay the sum of 767*l.* 6*s.* 8*d.* Scots for goods, of which there is no other proof of the value, than the statement in the pursuer's condescendence.

*Argument of the Appellant Macneil.*

This appellant ought to have been allowed his expences, since nothing is proved against him. He conceives, that no countenance ought to be given to the bringing vexatious suits against those who were at that time employed in his majesty's service; and he may be allowed to call this a vexatious suit as to him. The case of both the appellants is the more favourable, that the matters complained of were in June 1716, before the rebellion was at an end in Scotland, and the legislature thought fit so far to interpose, as to indemnify all persons who acted in the defence of his majesty's person and government in the year 1715, from vexatious suits and prosecutions.

*Argument of the Respondents.*

Any commander of a regular party is answerable for all the outrages committed by the party, unless he proves that he could not prevent the same. And he who has the legal command of a party, and allows them to commit outrages, is much more guilty than he who has no legal command; because he not only does the same injustice to the private persons injured by his party, but likewise commits a great crime against the government, in abusing the power and trust committed to him. But it is remarkable in this case, that the witnesses depone expressly, that the appellant and his party committed all these outrages and depredations, and that they heard him give orders for burning the houses, and saw him receive money for restoring some of the goods to the owners.

It is not the method of proceeding before the Court of Session, nor as the respondents conceive before any other courts, to give liberty and further time for examining witnesses, after the proof is concluded, and circumduction past, without some extraordinary reason for so doing. The appellant Munro obtained a second order for examining witnesses, of consent of the then pursuer, who was most willing to allow deduction of whatever was restored. But he would not consent to a third order, which was desired by the appellant only for delaying the cause; and the Court of Session most reasonably refused it, because the appellant could give no reason for such demand, but only that he had brought up witnesses, against whom the Court had found, that there was an evident objection in law.

With regard to the appellant Macneil, he was upon the same command with the other appellant, Munro, and not far distant, with a party of regular troops, and the respondents conceive that it was therefore proper to make him a party to the action, for it was not known, but that Macneil had the chief command of both parties. And by the custom and practice of Scotland, no person, who has a *probabilis causa litigandi* is ever decreed to pay costs.

Besides, Captain Macneil did not apply for costs, till after the decree was given out, and the suit fully terminated; and by the constant forms of the Court of Session, no costs are given if not moved for before giving out the decree. The respondents were not served with Macneil's petition for costs, and the principal cause being fully terminated below, they were not bound to appear further in court. The Court therefore refused the desire of Macneil's petition, without ordering the respondents to put in answers to it.

Judgment,  
31 Mar.  
1724.

After hearing counsel, *It is ordered and adjudged, That the interlocutor of the 28th of February, 1722-3, whereby the Lords of Session refused the appellant, Macneil, his costs, be reversed, and that the said Lords of Session do cause his costs to be taxed and ascertained, and when so ascertained, to be forthwith paid to him by the respondents; and it is further ordered and adjudged, That the interlocutor of the 19th of February, 1722-3, be reversed; and it is hereby declared, that it is the opinion of this House, "that William Munro, "and other persons of the party commanded by the appellant George "Munro, may be proper witnesses for the said appellant, in this cause, "notwithstanding their being of the same party, unless there be some "other just cause of objection against that testimony; and that the said "appellant be at liberty to produce witnesses in his defence; and that the "witnesses already examined on behalf of the plaintiff below, be re- "examined; and that the defendant below be at liberty to cross examine "them; and that the appellant, Munro, be heard in the Court below "as to the relevancy of the libel."*

For Appellant, P. Yorks. Dun. Forbes. Will. Hamilton.  
For Respondents, Ro. Dundas. C. Talbot.



Dame Esther Gray, Widow and Executrix  
of Sir James Gray, Bart. her late Hus-  
band, deceased, - - - - - *Appellant*;  
Edward Callander, Writer in Edinburgh, - *Respondent*.

Case 109.

Kaims,  
Jan. 1723.1<sup>st</sup> April 1724.

*Assignation General*.—An assignation to a creditor of as much of the first and readiest of the rents of his lands that should happen to be due to him at the time of his decease, as would satisfy and pay a certain sum, gave no preference in a competition of creditors after the debtor's death.

*Creditors of a defunct*.—*Act of Sederunt, 1642*.—After expiration of six months from the debtor's death, one creditor cites the executor in an action of constitution on the 18th of June, and same day the executor cites that creditor, and the general assignee above-mentioned, in a multiple poinding: the latter afterwards, on the 27th of June, cited the executor in an action of constitution; the creditor, giving the first citation, also got the first decree of constitution, and is by the Court preferred to the other; but the judgment is reversed, and both are preferred *pari passu*.

**A**FTER the determination of the appeal, No. 1, of this collection, by which the Duke of Hamilton was ordered to pay to Sir James Gray, Bart. the sum of 1000*l*. with interest thereof, upon an agreement of the parties, Sir James advanced so much money as, with the principal and interest then in arrear upon the said bond, made up 1400*l*. And for securing the repayment thereof, the Duke, on the 25th of March, 1709, executed a bond to Sir James in the sum of 1400*l*. of principal, payable with interest on the 15th of May, 1710; and in that bond the duke assigned to Sir James as much of the best and readiest of the rents of the Dukedom of Hamilton, whenever he should happen to succeed thereto, as would satisfy the said 1400*l*. and interest. Of the same date, the duke executed another deed, by which he assigned to Sir James as much of the first, readiest, and best of the rents, or arrears of rents of his lands in Scotland, that should be due to him at the time of his decease, and as much of the first and readiest of all his moveable goods, debts, and sums of money, and others whatsoever, that should happen to pertain and belong to him at the time of his decease, in case his mother should survive him, as should be sufficient to pay the said bond.

The duke, in his lifetime paid several sums of money to account of the interest of the said sum of 1400*l*. but died in November, 1712, in the lifetime of his mother, and no part of the principal money was paid. The Court of Session, in March thereafter, appointed one Crawford, factor, to receive the arrears of rents due to the duke at the time of his death; and to this factor Sir James intimated, in due form, the assignments of the arrears of rents made by the duke in his favour.

The late Duke of Hamilton was also indebted to the respondent in the sum of 900*l.* sterling with several years interest upon a bond dated 22d November 1703; and upon this bond the respondent had raised and executed letters of horning against the duke in 1706.

The present Duke of Hamilton was confirmed executor to his father deceased on the 16th of June 1722, and immediately gave up an inventory of all his father's personal estate, and particularly of the arrears of the rent that were due at the late duke's death, and which had been received by the factor, or continued in the hands of the tenants. His grace also raised an action of multiple poiding before the Court of Session, in which he called all his late father's creditors as parties.

In this action of multiple poiding both the appellant and respondent received citations on the 18th of June 1722; and on the same day the respondent cited the duke as executor in an action of constitution of his debt before the commissaries of Edinburgh. On the 4th of July the commissaries sustained process at the respondent's instance; on the 17th of July, they found the debt proved, and decerned against the executor; but the final decree of constitution, was not given out till the 21st of that month. Upon this decree, the respondent took out letters of horning and charged the executor; but further proceeding was stopped by the multiple poiding.

The appellant's husband on the 27th of June 1722, also cited the duke before the commissaries, and applied by petition to be conjoined in the respondent's action, but this was refused. Sir James Gray, on the 17th of July, obtained an interlocutor for sustaining process against the executor; but did not follow out a decree for payment of the debt.

The action of multiple poiding coming to be heard before the Lord Ordinary, Sir James Gray, insisted that by virtue of the assignation by the late Duke of Hamilton in his favour, of all the personal estate, he should die possessed of, and particularly of all the rents of his estates that should be due at the time of his death, Sir James, ought as to the personal estate to be preferred to all other creditors merely personal. The respondent on the other hand founded on his prior citation before the commissaries. The Lord Ordinary having reported this cause, the Court on the 18th of January 1723, "preferred the respondent." Sir James Gray reclaimed, and the Court, after answers for the respondent, on the 8th of February 1723, "found that Mr. Callander had no right " to the heirship moveables by virtue of his decree before the " commissaries; and found that the petitioner Sir James Gray " could have no preference upon his assignation, but remitted to " the Lord Ordinary to hear parties, how far the petitioner and " Mr. Callander upon their respective diligences were preferable " *pari possu* or not."

Sir James Gray in the mean time died, having left the appellant his executrix, and the cause being transferred against her, upon report of the Lord Ordinary, a hearing was ordered by the Court upon

upon the point of preference with respect to the diligence: and after a debate thereon, the Court on the 15th of November 1723, “ adhered to their former interlocutor, preferring the respondent.”

The appeal was brought from “ several interlocutory sentences of the Lords of Session of the 18th of January, the 8th of February, and 15th of November 1723.” Entered,  
21 Jan.  
1723-4.

*Heads of the Appellant's Argument.*

As Sir James Gray had a judgment against the duke, so long ago as 1708, and might have then sued it to execution, and recovered his payment: so out of friendship to his grace, he took the security in question, in order to secure his payment in all events; and the duke having executed the said assignment for a consideration so beneficial, Sir James ought to have the benefit thereof, and be preferred to any creditor who had no such security.

Sir James by this general assignment had a hypothec upon or conventional pledge of all the assignor's personal estate, for payment of his debt; and consequently the present duke who was confirmed executor, ought to be considered as a trustee for the assignee, so far as his debt extends; and his possession of the personal estate ought to be for the benefit of the assignee, and the executor being in the eye of the law the same person as the deceased, it is not necessary to give notice to him. Nor does it alter the case, that the assignor continued in possession, because the assignment was of such things as could not admit of a present possession, viz. the personal estate, the duke should die possessed of. And Sir James having given notice of his assignment to the factor appointed by the Court of Session to receive part of the very subject of the assignment, Sir James ought to be preferred to any other creditor as to these arrears, the factor being the only person to whom such notice could properly be given.

A debt thus fairly contracted, and secured by such an assignment, if it should not give a preferable right to the assignee, ought at least to entitle him to come in equally with any other creditor, and be paid in a due proportion, as far as the assets will go.

It is true that in order to prevent one creditor, who might be in a good correspondence with an executor, from carrying off all the effects to the hurt and exclusion of the others, an act of sederunt in 1662, was made by the Lords of Session, declaring “ that all creditors of defunct persons using legal diligence at any time within half a year of the defunct's death, by citation of the executors and intrometters with the defunct's goods, &c., shall come in *pari passu* with any other creditors, who have used more timely diligence.” But there is no law or statute which enacts, that after the expiration of the six months, a creditor giving a citation one day, or one hour before another creditor shall be paid in the first place. The appellant conceives, that all creditors having an equal right by the nature of their debts, who appear before assets are actually applied, ought to be paid equally; the

*Act of Sederunt.  
28 Feb.  
1662.*

case would otherwise be extremely hard. The reason of this regulation relative to creditors doing diligence within six months of the debtor's death, favours the appellant; for if all creditors, who commenced their actions within six months of the debtor's death, ought to be paid equally in order to prevent surprize, for the same reason ought creditors, who sue within six months after confirmation, to be equally paid; the executor being the only proper person to be sued.

Sir James in this case, not only cited the executor a few days after his confirmation, but had prayed to be admitted to plead preference in the respondent's suit, and had even obtained sentence against the executor, as soon as the respondent, and all this before any payment made by the executor, for to this hour he is possessed of the whole effects, and has not paid any part to the respondent.

The citation in the multiple poinding was given to Sir James, and to the respondent on the same day, that the respondent cited the duke before the commissaries: and this citation by the executor to both creditors, ought to be considered as equivalent to, and the same as if Sir James had then cited the executor, since it put a stop to any effectual proceedings before the Commissary Court, and brought the matter to be properly determined in the Court of Session; and Sir James in that Court could have recovered a decree, just as if he had cited the executor.

#### *Heads of the Respondent's Argument.*

The law of Scotland, for the benefit of commerce, has long since repudiated all private sales, or impignations of goods or effects, unless the goods and effects so sold, or pledged be actually delivered to the buyer or creditor, or to some third person in trust for him. It is certain that the late Duke of Hamilton might, during his life, sell or dispose of any part of his personal estate, and that the same was subject to be taken in execution by any creditor, notwithstanding of this assignment to Sir James Gray, which after the late duke's death, ought no more to protect his personal estate, than it did or could do in his lifetime.

By the law and custom of Scotland, creditors were preferred according to their diligence, the creditor who gave the first citation being preferred to all the rest. But in the year 1662, the Lords of Session, considering that creditors, living at a distance, were often without any fault or delay of theirs excluded by the prior diligence of creditors, who lived near to the deceased, and thereby got quicker intelligence of his death, did therefore make an act of a sederunt settling a rule, that all creditors giving citations within six months of the death of the debtor, should be preferred *pari passu*. But if the creditor did not come forward in that time, the Lords of Session thought he deserved no relief; and therefore after the expiration of that time, the old law still takes place, and creditors are preferred according to the priority of their citations; and *vigilantibus jura subveniunt*. Were it otherwise the executor might prefer whom he pleased by insisting on dilatory pleas

pleas against one creditor, in order to *retard* his obtaining a decree, and allowing another creditor to get a decree without dispute.

The commissaries could not by the forms of their Court, admit the appellant into the respondent's action before them; every person who has a just claim, and brings his action, gets a separate decree against the executor; but though the commissaries had granted this request, it could have been of no service, the preference depending upon the date of the citation.

The appellant stated, that Sir James obtained a decree of the commissaries on the same day that the respondent obtained his; but the interlocutor which the appellant points at, is that of the 17th of July, sustaining process at her husband's instance; and the respondent had obtained an interlocutor of the same nature with that upon the 4th of July, and upon the 17th, he obtained a further judgment, finding the libel proved, and decreeing to pay, which is what neither Sir James, nor the appellant ever obtained; so that in effect, the appellant has no decree of the proper court in her favour. Nor could the Lords of Session upon the multiple pinding have given her such a decree; for in that action they can prefer no creditor, unless such creditor have a decree constituting his debt against the executor, or an action pending before the Court of Session for that end, neither of which the appellant ever had: whereas the respondent has a final decree of the Commissary Court of the 21st of July 1722, constituting his debt against the executor; and so has not only the first citation, but also the first and only decree.

After hearing counsel, *It is ordered and adjudged that the interlocutor complained of in the said appeal of the 15th of November 1723, adhering to the interlocutor of the 18th of January 1723, be reversed: And it is hereby declared, that it is the opinion of this House, "that the appellant in virtue of her diligence is entitled to a proportionable share, with the respondent of the personal estate, and execution of James late Duke of Hamilton, and that the appellant and respondent are preferable, and to be paid pari passu accordingly."* Judgment, 1 April, 1724.

For Appellant, *Ro. Dundas. G. Waorg. Will. Hamilton.*

For Respondent, *Dum. Forbes. C. Talbot.*

In the Dictionary vol. I. p. 207. *Creditors of a Defunct*, the judgment of the Court of Session, though here reversed, is mentioned as an existing decision: the statement appears also to be erroneous in mentioning the case, as if the creditor who gave the last citation obtained the first decree. It is also stated by Mr. Erskine, Instit. B. 3. tit. 9. § 46.

Case 110. Margaret, Agnes, Mary, Marion, and Janet  
Kennedies, Heirs Portioners of the de-  
ceased Alexander Kennedy, of Glenour,  
their Brother, and their respective Huf-  
bands for their Interests, - - - *Appellants ;*  
Alexander Macdowall, of Garthland, - *Respondent.*

13th April 1724.

*Note.*—A bond reduced as videtur, where after the sum the word "Pounds" was written upon an eraser, and the penalty was in merks, offering to a fifth part of the principal if it had been merks, but not if pounds, as it stood on the bond as claimed on. This bond had been allowed, as it then stood, for a compensation in an action, between the father of the persons sounding on it, and a third party, upwards of thirty years before, but was not then produced.

*Costs and Expenses.*—An affirmance, with 20l. costs to the respondent.

THE late John Kennedy of Glenour deceased, the father of the appellants, being indebted to one Robert Linn in the sum of 2500 merks, on the 24th of April 1672, granted a bond for that sum, blank in the creditor's name, as was then customary in Scotland. And in 1682, the father of the appellants became further indebted to this Linn, in the sum of 1420 merks, for which he granted three several bonds to Linn.

It appears, too, that on the 20th of August 1674, Linn had executed a bond in favour of the appellant's father: whether or not this was an existing bond, and whether or not it had been vitiated in the sum, is the subject of the present appeal.

Robert Linn died in 1683, leaving three children under age, and the respondent's father, one of their tutors and curators. In 1684, the children were confirmed executors to their father, and gave in an inventory bearing to be of the whole effects, and debts belonging to him, and also of the debts owing by him; and in this inventory no mention is made of the bond granted by Linn, to the appellant's father in August 1674: in this confirmation, the appellant's father became cautioner for the executors.

In a short time after Linn's death, one Captain Mac Culloch, a creditor of the deceased, in the sum of 7000 merks, arrested in the hands of the appellant's father, and of another person indebted to Linn, all sums owing by them; and afterwards brought an action of forthcoming against them in the Court of Session; in which (the appellants mention) Linn's children were called as parties; but (the respondent states,) the minors did not appear. In that action the appellants father appeared by his counsel, and gave in a declaration signed by him, bearing that he was debtor to the deceased Robert Linn, in the four bonds above mentioned, except in so far as the said Robert Linn was debtor to him, by the said bond of the 20th of August 1674, which he stated to be for 1730l. Scots, with interest from the date:

date: this bond itself was not then produced, but Captain Mac Culloch in February 1685, took a decree against the appellants' father for the balance, being 2041 merks, of the said four bonds, after deduction of the bond of August 1674.

After this period the said bond for 2500 merks was sued to execution by the children of Robert Linn, and their curator; and the appellants' father was thrown into gaol, where he continued a considerable time, and at last, with the assistance of a mob, broke prison about the year 1690: but no satisfaction of the debt was obtained.

The respondent in 1721, obtained the said four bonds, granted by the appellants' father to be conveyed to him, and brought an action thereupon in 1721, against the appellants as heirs or executors of their father before the Court of Session. In this action the appellants appeared and made defences, that these bonds were extinguished by compensation and payment of the balance to Mac Culloch in 1685; and for proof of this they referred to the decree of forthcoming, and to the bond granted by Robert Linn to the father of the appellants. The respondent having got this original bond produced in Court, from the record in which it had been registered; insisted that the bond had not been produced in the former action, and that neither he, nor the persons who had assigned to him had appeared in that action, and that he could, therefore, still object to that bond's being allowed as a ground of compensation, to extinguish any of the bonds upon which he sued: he further objected, that the bond was prescribed, not having been sued for within 40 years; and likewise that it appeared to have been vitiated, the word *pounds* being superinduced, or put in place of the word *merks*, and that therefore the bond was entirely void.

The Court on the 19th of July 1723, after defences for the appellants "repelled the prescription and sustained the compensation, and also repelled the objection proposed against the "bond."

The respondent reclaimed, setting forth that he had clearly discovered by the help of glasses, that the bond had originally been for the sum of 1730 merks, and that the word *pounds* had been put in place of the word *merks*, with a different hand and different ink, and that the penalty still remained only 300 merks, which was a proportionable penalty to 1730 *merks*; and, that the presumption was, that the amendment, or vitiation was done after executing, unless the respondents could prove that it was so done before delivery and by consent of parties. After answers for the appellants, the Court on the 26th of November 1723, "found the bond vitiated and therefore declared it null."

The appellants having reclaimed, the Court on the 20th of December 1723, after answers for the respondent, "refused the "desire of the petition, and adhered to their former interlocutor "annulling the bond.

Entered  
27 Jan.  
1723-4.

The appeal was brought from "two interlocutors of the Lords  
"of Session, of the 26th of November, and 20th of Decem-  
"ber 1723."

*Heads of the Appellants' Argument.*

The compensation upon this bond for 1730l. was allowed by the Lords of Session in 1685, in the action of forthcoming at the suit of John Mac Culloch; and the persons who had then right to these bonds, were parties to that action, and ought to be concluded by the decrees and orders then made, and not left at liberty to dispute the justice of them, especially after such a distance of time.

As to the objection now offered, that the bond is vitiated, if any alteration appears to have been made, it was certainly made before delivery, and by consent of parties; and for this the presumptions are very strong.

The respondent's father, who was tutor to Linn's children, made no objection against this bond in the action at the instance of John Mac Culloch, though he certainly knew that this bond was then set up by the appellants' father as a good bond for the sum of 1730l. and was by the Court of Session allowed of in discharge of so much of the debt due by the appellant's father to this Linn; and Patrick Linn the writer of, and a subscribing witness to this bond was then alive.

The respondent's father was so conscious, that this was a good bond for the said sum of 1730l., that he never pretended to sue upon either of the said three bonds granted by the appellants' father to Robert Linn: and when he sued upon the said blank bond for 2500 merks, he filled up his own name in the bond, thereby to prevent the appellants' father's plea of compensation.

Neither the respondent nor his father ever sued upon any of the bonds in question, so long as any person was alive, who could prove or direct how to prove, that there was any alteration made in this bond at the time of the delivery; so that it is probable that the respondent and his father knew of the objection made against this bond, and purposely delayed bringing their action till it were impossible for the appellants to find any proof of the transaction at the time the bond was executed.

Neither the respondent nor his father ever demanded so much as any part of the interest due upon all or any of these bonds, now sued on, though one of them is granted 50, and the rest 40 years ago; and if the profits of compound interest be considered, it is not probable that either the respondent or his father, would have willingly sustained such a loss.

It is no argument against the bond, that the penalty still remains the sum of 300 merks. Penalties do not always bear a certain proportion to the principal sum; and the appellants humbly think this to be a very strong argument against any fraudulent alteration of the bond; for if any such fraudulent alteration had



had been made, the person committing such fraud would certainly have turned merks into pounds in that place, as well as in the other parts of the bond.

The respondent himself acknowledges, that this bond was originally for 1730 merks; therefore, granting that these *marks* had been fraudulently altered and made *pounds* by the appellant's father, the declaring it entirely void, is punishing the appellants most severely for a fault they were not privy to, and the punishment is the more grievous to them, in respect they are thereby stripped of their all.

*Heads of the Respondent's Argument.*

The bond in question can be the foundation of no claim or suit; in the form it now appears it certainly was not the deed of Robert Linn: the writing bears Robert Linn to have borrowed and received from the said John Kennedy the sum of 1730 merks, and then there is a hole in the paper seeming to be purposely worn out, and the letter "d" is written with fresh ink upon the side of the tearing to make it be believed that the word "pounds" had been there written.—And in the clause obliging to repay the money are these words "which sum of one thousand seven hundred and thirty," and then there is a blank not sufficient to have contained the word "pounds," and therefore those who made the vitiation, and inserted the word pounds have been obliged to run one half of the word above the line, so as to make an interlineation, and the straight part of the line below "pounds" still remains blank.—And this vitiation appears plain, and did so appear to the judges below; nor is it any objection, that is not obvious to every eye without the help of glasses; when deeds are falsified care is generally taken to do it in the most artful way.

The penalty on default of payment inserted in the bond is 300 merks, which according to the custom in Scotland, is a penalty suitable to 1730 merks, but no way suitable to 1730*l.*, nor is it usual to insert a penalty but in money of the same denomination with the principal sum.—A deed vitiated or falsified can have no credit at all in judgment; it is not the deed executed by the party, and no man or his heirs can be sued upon a deed not executed by him.—After the vitiation of a bond it is entirely uncertain what word or sum was originally inserted in it, or if any sum was mentioned in it.

But even supposing this bond were not so apparently vitiated, yet it must be presumed, that it had never been fully executed or delivered. For though it be dated in 1674, no suit has been brought or demand made upon it against Robert Linn, the pretended debtor, or his heirs to this day. And John Kennedy having been debtor to Robert Linn by bond, for a sum which with the interest exceeded the sum in this bond, at the time it is pretended to have been executed, there was no good reason why Robert Linn should have granted this bond, and not rather imputed the money towards satisfaction of the debt owing to him, and given John Kennedy an acquittance. And it is equally unreasonable

sonable to believe that John Kennedy would have executed the other to Robert Linn in 1682, if this bond had been then owing to Kennedy, without making any mention of it.

In 1684 Robert Linn's children were confirmed executors to him, and an inventory was given up not only of the debts, and assets of the said Robert Linn, but also of the debts owing by him; and, at taking out such confirmation John Kennedy became cautioner for the executors; yet no mention was there made of any debt owing to him, which it cannot be supposed he would have omitted if there really had been any debt owing to him. In 1690, the bond upon which the respondent claims, was so far put to execution against John Kennedy himself, that he was put in prison, and continued there for a considerable time, without any mention of this pretended counter claim, which had it been a true debt, would have afforded him a good plea, and saved him from imprisonment.

With regard to Captain Mac Culloch's action of forthcoming, he was only a creditor to Robert Linn, and his heirs; he could not know the circumstances of their affairs, nor whether the bond was a true one or not. There remained after allowance of this bond as much of the sums he then sued for, as was sufficient to answer his demand, and therefore he did not trouble himself to enquire whether there was such a bond or not; the bond was not produced in the action, nor were the heirs of Robert Linn, then minors, appearing as parties in that suit.

Judgment,  
23 April  
1784.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed: And it is further ordered that the appellants do pay or cause to be paid to the respondent the sum of 20l. for his costs in respect of the said appeal.*

For Appellants;	C. Wearg.	Will. Hamilton.
For Respondent,	Ro. Dundas.	C. Talbot.

*Ex parte*

James Hamilton of Dalzell, Esq ;

*Appellant ;*

Case III,

Bruce,  
13 Nov.  
1714.James Hamilton brother to William Hamilton,  
of Orbieftoun, deceased, and the creditors  
of the said William Hamilton, and James  
his Son,*Respondents.*

18th April 1724.

*Service of heirs*.—An estate being disposed to a father, and failing him to his eldest son, and the heirs male of his body, with other substitutions ; and the eldest son having survived the father was infest thereon, and died afterwards without serving heir to him : the Court found the right to the estate not fully vested in the son without a service, but the judgment is reversed upon appeal.

*Death-bed*.—The Court having found that death-bed could be pleaded by an heir cut off by two prior deeds, and by creditors, the judgment is reversed.

Did, contracting the sickness at the time of executing the deed, constitute death-bed ?

*Fier absolute limited*.—A father grants an absolute disposition to his son, which is not completed by infestment or by making up schedules in terms thereof the son afterwards joins with the father in making two new settlements of the estate, and the father who still continued in possession grants a disposition to a third party, after the son's death : the Court having found these posterior dispositions were not of prejudice to the son's creditors, the judgment is reversed.

SIR John Hamilton of Orbieftoun, deceased, having granted several bonds for sums of money, greater than the value of his estate, to a Mr. Walkinshaw, in 1653, this Walkinshaw obtained decrees of apprising of the said estate ; and having thereupon taken out a charter from the then Dukes of Hamilton, the superior, he was duly infest in the premises, in 1659.

This Walkinshaw afterwards disposed the said apprising, and all his right to the premises to Sir James Hamilton, son of the said Sir John ; whom failing to William his eldest son, and the heirs male of his body ; whom failing to James Hamilton (the respondent) second son of the said Sir James, and the heirs male of his body ; whom failing to the other persons therein mentioned, Under this disposition Sir James enjoyed the estate during his life ; and, after his death, William his son entered thereto, and took infestment upon Walkinshaw's disposition.

In 1699, William Hamilton made a voluntary settlement of his estate in favour of James his son, but he still continued in possession, and afterwards sold a considerable part of his estate for payment of debts by him contracted. In 1704, a contract was executed at Cramond, between William the father and James his son, whereby William the father agreed to settle the estate upon James the son, and the heirs male of his body ; whom failing upon the heirs male of the body of the respondent James ; whom failing upon the appellant, and the heirs male of his body, with several other substitutions of heirs ; and this deed they agreed should be drawn and executed at the sight of Lord Whitelaw.

No

No deed was executed in terms of this contract; but in February 1708, William the father and James his son made a new entail or settlement of the estate, executed at Buoy of the Nore, whereby failing heirs male of their own bodies, they disposed the same to Sir David Hamilton, (since deceased), and the heirs male of his body; with several other substitutions of heirs. In this deed, the respondent James, and the heirs of his body, were not only passed over, but it contained a clause, that if the said Sir David Hamilton, or any of the heirs of entail, should ever convey any part of the premises to the respondent James, or his heirs, the same should be a forfeiture of the right of such persons; and this deed contained a power of revocation.

The said settlements executed by the father and son were all gratuitous, and none of them was followed with *fasine*, or put upon record. And James the son having died without heirs of his body, William the father on the 26th of December 1711, disposed his lands of Orbieftoun, and others to the appellant; upon this disposition the appellant was infeft; on the same 26th of December, William the father conveyed to the appellant several debts due to him by the Lord Sempill. This William Hamilton died on the 29th of January 1712.

After his death the respondent James his brother, and heir at law, applied to be served heir of provision to Sir James Hamilton their father, passing by William the brother, in order to avoid all his acts and deeds. The ground of his claim was, that under the disposition by Walkinshaw, Sir James was vested in the fee of the estate; and William his son having neglected to serve heir to him, the respondent, who was the next substitute in Walkinshaw's disposition, was entitled to take up the succession by a service to his father. The appellant opposed this service, and the Court of Session having appointed two of their number to be assessors to the macers, the appellant contended before them, that the title whereby the said estate was possessed, was the disposition from Walkinshaw, in which Sir James Hamilton was merely life-renter, and his son William heir; and therefore that William the son had a right to take the estate without serving heir to Sir James, to whom he was nominatim substitute in the deed. On the 29th of January 1713, the Court of Session "found that James Hamilton, the respondent, might serve heir in general to William his brother, Sir James his father, and Sir John his grandfather, notwithstanding of the dispositions to the appellant; and that he might serve heir in special to William his brother, Sir James his father, and Sir James his grandfather, in any other lands not contained in the said charter of apprising and *fasine* thereon." To this interlocutor, the Court adhered on the 25th of February thereafter.

The respondent was afterwards served heir of provision to Sir James his father, in the lands contained in the said charter; and the retour being opposed by the appellant, the Court on the 22d of January 1714, "allowed the service as claimed to be returned with this provision that, before retouring, the respondent James Hamilton should give an obligation subjecting himself to the  
"lawful

"lawful debts and deeds of the said William his brother, as heir  
" *cum beneficio inventarij* to the said William."

Upon the application of several of the creditors of William Hamilton, the Court on the 11th of February 1714, "remitted it  
" to the Lord Fountainhall to hear parties on this point, viz.  
" Whether or not the estate disposed by Walkinshaw was after  
" the decease of Sir James Hamilton, fully vested and settled in  
" the person of the deceased William Hamilton, without the  
" necessity of a service, and if the said William was heir, or if  
" the said estate, or any part thereof was in *hereditate jacente* of  
" the said Sir James Hamilton." Parties were accordingly heard  
on this point, and after a report to the Court, their lordships on  
the 10th of June 1714, "found that the estate disposed by  
" Walkinshaw was not after the decease of Sir James Hamilton,  
" fully vested and settled in the person of the deceased William  
" Hamilton without the necessity of a service; and therefore al-  
" lowed the service to be retoured, in terms of the interlocutor of  
" the 22d of January last."

Pending this question, the respondent James, and several  
creditors of the said William Hamilton, brought their action of  
reduction of the two deeds executed by William in favour of the  
appellant, on the ground that they were in fraud of creditors, and  
executed not only when the grantor was in the eye of the law, a  
bankrupt, but when he was on death-bed. The appellant agreed  
that the creditors of William the father should be preferred, so far as  
they were truly creditors, but he insisted that the said conveyances  
could not be reduced as granted on death-bed at the suit of cre-  
ditors, that being an action only competent to the heir; and that  
the heir in this case was cut off by two prior settlements made  
long before these in question. The Lord Ordinary on the 28th  
of January 1713, "found that the reason of reduction, that the  
" said writs were granted by the said William Hamilton on death-  
" bed, at least after contracting the sickness of which he died,  
" without going to kirk, or market, or living 60 days after, rele-  
" vant to be proved: and also that the same were granted by the  
" said William Hamilton, when he was bankrupt and insolvent  
" and under diligence by horning and caption, and had retired,  
" absconded or forceably defended himself, relevant to be proved;"  
and a time was limited for bringing such proof. To this inter-  
locutor, the Court adhered on the 12th of February thereafter.

Upon the application of the appellant, diligence was granted  
for recovery of the settlement made of the premises in 1708, upon  
Sir David Hamilton. Several witnesses having been examined  
the cause was set down for hearing; but before the same came on  
the creditors of James the son, applied to the Court for liberty to  
concur with the creditors of William the father in the action,  
which was allowed. The cause coming to be argued the appellant  
contended that by the deed 1708, the respondent James, as heir at  
law, was expressly excluded, as well as by the contract at Cramond,  
in 1704. On the other hand the respondent James contended, that  
he was not excluded by the last settlement, but if he was, it was

*jus tertij* to the appellant, who could claim no right by that settlement. The appellant in reply, contended that the power of revocation was to be by the father and son, if both alive, yet upon the death of the son, that such power survived to the father; and that the appellant being in possession, it was sufficient for him to shew, that the title was not in the respondent; but that the appellant had an immediate interest, he being next substituted by the deed at Cramond to the heirs male of the respondent's body, who were excluded by the subsequent settlement; and that therefore the estate descended to him. The Lord Ordinary on the 12th of July 1715, "found that by the contract dated at Cramond, the  
 " estate of Orbieftoun was entailed to James the son, with power  
 " to the said James, with consent of his father to alter, and that  
 " in virtue thereof the said contract was altered by a subsequent  
 " entail dated at *Buoy of the Nore*, and found that the father had no  
 " power to alter the said second entail by himself alone, and found  
 " that the respondent James, the right heir and the descendants of  
 " his body are not excluded from the succession by the clause in  
 " the said second entail. And in regard the appellant has no  
 " right or title by the second entail, preferable to the respondent  
 " James, that it is *jus tertij* to him so found thereon; and that  
 " it was competent to the respondents, the creditors to quarrel the  
 " dispositions granted by William the father, to the appellant  
 " upon the head of death-bed." And to this interlocutor of the  
 Lord Ordinary, the Court adhered on the 15th of June 1716.

After advising the proof of the alleged death-bed, the Court on the 7th of July 1716, "found it proved that William the  
 " father contracted the sickness whereof he died, at the time of  
 " granting the two dispositions to the appellant, and that he went  
 " not to kirk, or market, after granting thereof." On the 17th  
 of November thereafter, the Court "found the qualification  
 " alleged on the act of Parliament 1696, not relevant to reduce  
 " the disposition, except in so far as the same may be made use of  
 " for the payment or security of debts anterior to the said dispo-  
 " sition."

The respondents, the creditors of James the son, insisted that the dispositions to the appellant might be reduced in regard they were granted by the father, after he was divested by a conveyance made to his son in 1699. The appellant insisted that this disposition was varied by the articles at Cramond, and that the father still continued in possession and afterwards sold part of the estate. But the Court upon the 22d of December 1716, "found  
 " that the minutes of contract entered into at Cramond did not  
 " innovate the former disposition granted by the said William the  
 " father to his son, in so far as concerns the lands of Orbieftoun,  
 " in prejudice of the son's creditors."

The appeal was brought from "several interlocutors of the Lords  
 " of Session, of the 28th and 29th of January, the 12th and 25th of  
 " February 1713, the 22d of January, 11th of February and 19th  
 " of June, 1714, the 21st of January, 11th of February, and 12th  
 " of July 1715, the 15th of June, 7th of July, and 22d and  
 29th

" 25th of December 1716, and 3d and 10th of January next following (a)."

*Heads of the Appellant's Argument.*

The estate in question being conveyed by Mr. Walkinshaw to Sir James Hamilton, and after his decease to William his eldest son, and the heirs male of his body, Sir James was only life-renter, and William fiar; consequently there was no occasion for William to serve heir to Sir James. For this the authority of Lord Stair is express: "if heritage (says he) should be granted for example to John, and after his decease to William, and his heirs, John would be thereby naked life renter, and William fiar, who could not be served as heir to John." Stair B. 3.  
Tit. 4.  
§ 33.

Supposing Sir James had been fiar, yet William being nominatim substitute to him, he upon Sir James's death, became seised in fee of the estate, without any necessity of a service; for in that case, *mortuus sicut vivum*, the conveyance to William *nominatim* being considered as an immediate conveyance or interest, vested in William, subject and expectant upon the contingency of his father's death only.

William the son entered upon the estate without any service, continued in possession of it for about 40 years as absolute proprietor, sold the greatest part of the estate, and granted heritable securities over it to a considerable value. If a service were necessary, then he had no right, and the sale and heritable securities are void; yet by one of the interlocutors appealed from the estate is subjected to all of them. If the estate is to be subject to William's other deeds, why not to those in favour of the appellant; and if subject to them, by which the estate was conveyed to the appellant, there was no room for the respondent James to serve heir of provision to his father.

If the respondent James had no title to be served heir, he had no right to bring any action for reducing the conveyances made to the appellant, as being granted upon death-bed, that action being only indulged to an heir.

But supposing he were heir, yet this action ought not to have been sustained, because there is no presumption of the grantor's being imposed upon to his prejudice in this case, for the respondent was expressly deprived of the right of succession, not only by the contract in 1704, but by the deed in 1708, in the last of which the giving or conveying any part of the estate to the respondent, is declared a forfeiture upon the person making such conveyance. At all events such action was not competent to creditors.

Though William the father in 1699, made a voluntary settlement of his estate in favour of James the son, subject to his debts in a schedule annexed, and reserving to himself a life-rent of certain lands; yet that was never completed, for the in-

(a) Some of these interlocutors are not stated in the appeal case.

ventory of debts was never made up, nor any schedule annexed. The very lands which the father was to life-rent were never filled up, but a blank was left for them; and the father still continued in possession and afterwards sold the greatest part of the estate. Besides that was entirely varied by the agreement between the father and son in 1704; and if the son had any claim by the first conveyance, as it was but a personal right, he could certainly waive that, and the subsequent agreement in 1704, was an actual waiver thereof. All the debts claimed by the creditors of James were contracted after the said agreement of 1704, by which he had waived the former conveyance.

Judgment,  
28 April,  
1724.

Counsel appearing only for the appellant, they were fully heard, and due consideration had of what was by them offered: and this cause having been formerly set down to be heard *ex parte*, in default of any answer of the respondents, or any of them, after a peremptory day appointed for that purpose, and the respondents having been after that so far indulged, as to have the cause put off to a further day, with liberty for them to be then heard, and in order thereto to put in their answer to the said appeal; and yet this day not appearing, but deserting their defence and opposition to the said appeal,

*It is ordered and adjudged, that the said several interlocutors complained of in the said appeal be reversed; and it is hereby declared, that it is the opinion of this House that the said William Hamilton, elder brother of James Hamilton the respondent, was in virtue of the disposition from Walkinshaw, in the pleadings mentioned, fully vested in the fee and property of the estate of Orbieftoun, without the necessity of serving heir to Sir James Hamilton, his father. And that the two dispositions by the said William Hamilton the 26th Day of December 1711, in the pleadings mentioned, in favour of the appellants were good and effectual deeds, and the same are hereby established, subject to the true and lawful debts of the said William Hamilton.*

For Appellant, *Dun. Forbes. Will. Hamilton.*

On the point of the *service of heirs*, the judgment of the Court of Session, which is here reversed, is stated as an existing case in the Dictionary of Decisions, vol. II. p. 367. *Service and Confirmation.*

The other points appealed are also of great importance.



Thomas Paterson, Esq. - - - Appellant; Case 112.  
 Archibald Ogilvie, and Anthony Murray, Esq. Respondents.

20th April 1724.

*Process—Qualified Condescendence.*—In the reduction of a bond, bearing to be for money lent, for want of an onerous cause, the defender acknowledges that the consideration was the future transfer of South Sea stock, and states that such transfer was afterwards made accordingly to the pursuer's order. This quality in the condescendence did not prove against the pursuers.

*South Sea Company.*—A B. 7 Q. 1. stat. 2.

*Foreign.*—It was no nullity in a bond that it was executed in England, in the Scotch form.

*Costs.*—An Affirmance with 40*l.* costs to one respondent.

ON the 15th of August 1720, the respondents agreed to purchase from the appellant 1000*l.* South Sea stock, with the Midsummer dividend at 1150*l.* per cent, and the appellant gave to each of the respondents a note, obliging himself to transfer to each of them 500*l.* South Sea stock, with the Midsummer dividend, as soon as the books of the said company opened; and the respondents executed a bond in the Scots form to the appellant for 11,500*l.* bearing to be for money lent and advanced, payable on the 25th of March then next.

Disputes afterwards arising relative to this bond, the appellant on the 28th of September, raised and executed letters of inhibition in Scotland against both the respondents. In November following a bill was exhibited in their names in the Court of Chancery, against the appellant relative to this bond, and the South Sea stock; but they afterwards obtained an order to amend their bill, and soon after they took an order to dismiss the same.

The respondents thereupon brought an action against the appellant before the Court of Session to reduce and set aside the said bond, as being without an onerous cause; for that the stock which was to have been transferred by the appellant, and which was the only consideration of the bond never was transferred to them or their order. The Lord Ordinary on the 29th of July 1721, ordered both parties to condescend upon the facts in the case.

In obedience to this order, the appellant stated, that the true cause of the granting and delivery of the bond craved to be reduced was his granting and delivering to each of the pursuers an obligatory note for transferring to each of them 500*l.* South Sea stock, with the Midsummer dividend, which notes were granted in respect the books were then shut; and which 1000*l.* was accordingly on or about the 26th of August 1720. transferred to the pursuers their order *respective*, viz. to Mr. Powell of the South Sea Company; and that one of the pursuers having brought to the defender a permit for transferring the said stock to Mr. Powell, upon a loan of 4000*l.* he at their desire did accordingly transfer the same, and received the said 4000*l.* and at their desire, applied the same as

follows, viz. at the desire of Mr. Ogilvie 2000*l.* to the credit of Captain Abercromby's account with the defender; and at the desire of Mr. Murray, the other 2000*l.* was applied to Mr. Murray's own credit, in part of a note for 15,925*l.* due by him to the said defender; with which transfer and application of the 4000*l.*, the pursuers were so fully satisfied, that Mr. Ogilvie gave up to the defender the note, obliging him to transfer 500*l.* of the said stock to him; and Mr. Murray was content to have done the same, but declared he had lost his pocket book, and in it the said note. And the defender's procurators further declared that the Midsummer dividend was still ready to be transferred by the defender to the pursuers. And they stated that they made that acknowledgement under protestation, that the same should not be disjoined or separated, but that the same, and every part of it should be understood and received as the true matter of fact, which passed between the pursuer and defender, on which he was willing to make oath.

The respondents on the other hand jointly declared, that at the opening of the books, they concerted that they should cause transfer their two sums of 500*l.* stock to Colonel Francis Farquhar for their joint behoofs; but denied that such stock was transferred by their order, or with their approbation to Mr. Powell, for obtaining a loan of 4000*l.* Mr. Ogilvie acknowledged that the said obligatory note, granted by the defender to him, was retired by him to the defender upon verbal assurance that he had transferred to Colonel Farquhar for his behoof the said 500*l.* stock, which he afterwards discovered never to have been transferred either to Colonel Farquhar, or any other person having power from him.

The Court having upon the petition of the respondents directed the appellant to make answer to several other facts then charged by them, the appellant's procurators acknowledged that between the 22d of August 1720, and the 29th, the day of making the transference to Powell on their behalf, he, the appellant, had made further transference on the loan of 5000*l.* South Sea stock to Mr. Powell; that the loan stood charged on the appellant's account in the company's books, neither did they know of any document, or legal evidence for making it appear, that the said stock or the reversion thereof was truly vested in the pursuers, so as that they had access to redeem and sell, or dispose of it upon payment of the loan; and that the same was in trust in the appellants person, wherewith the respondents were satisfied when Mr. Ogilvie delivered up the note to the appellant; and that the appellant was always ready to deliver to the respondents an order on the treasurer of the South Sea Company, to entitle them to redeem the said stock, but the same was never demanded.

Thus far the respondents proceeded jointly in this action of reduction; but the respondent Murray who was indebted in a large sum of money to the appellant, having made some agreement with him, ordered the action to be deferred on his part.

After this the respondent Ogilvie proceeded in the action for himself, and prayed that the appellant should be ordered to condescend  
upon

upon what stock he was entitled to in his own right on the 15th of August 1720, or within six days thereafter. The Lord Ordinary made such order accordingly, and the appellant offered in general terms to prove that at the time of the sale he was entitled to a much greater quantity of stock than he sold to the respondents, but he declined to set forth an account of all his transactions as unreasonable.

Upon hearing the cause, the respondent insisted upon these grounds of reduction, 1st, that the bond was null, having been executed in England, in the Scotch form. 2dly, That the bond was granted without a valuable consideration. 3dly, That in terms of the act of parliament 7 Geo. 1. statute 2. it was void, the appellant not being possessed of, or entitled to the stock in terms of the act. And 4thly, That the contract being unperformed on the 29th of September, 1721, in terms also of said act ought to have been registered, which it was not, and that therefore the same was void and null. After a hearing upon these points, the Court on the 1st of February 1724, "repelled the reason of reduction, "that the bond was executed in England, after the Scots form; but "found that the cause of granting the bond craved to be reduced, "was the defender's obligatory note, for transferring to the pursuer "Ogilvie 500*l.* capital South Sea stock, with the Midsummer "dividend; and that the defender's declaration of the special "fact does not qualify or prove that a transfer was accordingly "made, or that any benefit did accrue to the pursuer for the "500*l.* stock which ought to have been transferred: and also found "that the contract not having been performed, ought to have been "registered, conformably to the act of Parliament; and also found, "that the defender not having given in a special condescendance "of any stock in his person, at the date of the bond, nor within "six days thereafter, he is presumed to have had none."

The appeal was brought from "part of an interlocutory sentence "or decree of the Lords of Session, made the 1st day of February "1724."

Entered  
11 Feb.  
1723-4.

*Heads of the Appellant's Argument.*

As the only proof made use of to set aside the bond in question was the acknowledgment of the appellant, that it was given in consideration of an agreement for the sale of stock; so if the respondents would take any benefit from that acknowledgement they must take it altogether, and admit that part likewise to be true which mentions that the stock was transferred to their order. If the respondents have taken this as their only proof, it would be extremely hard upon the appellant, if one part of the proof were to be supported, and the other not, especially in a case where there were no parties to the real transaction, but the appellant and respondents. The actual transfer of the stock to the order of the respondents appears also by the circumstance of the respondent Ogilvie's delivering up to the appellant his obligatory note, which was his security for the transfer of the stock, and the consideration for granting the bond. And the respondent Murray would have done the same, had he not lost his pocket book and the note in it.

The counter allegations of the respondent Ogilvie ought not to have been taken as true, without proof.

This transfer, like all others upon loans, was made absolutely, without any power of redemption expressed; but these transfers being made to an officer named for that purpose, a retransfer would have been made at any time upon payment of the money. The appellant was always ready to have given the respondents any declaration, if they had desired it, that the stock was theirs, but they never did.

With regard to the objections upon the act of parliament, that the transaction was not completed, the appellant transferred what he was desired to do; and he always was willing upon payment of what was due to him upon the bond, to transfer the Midsummer dividend upon said stock, and all the profits thereof to the respondents. But since the respondents gave the appellant a bond for the payment of a certain sum of money, though that bond was given in consideration of notes to transfer stock, yet there could be no occasion to register the same; for nothing is required by the act to be registered but contracts for the sale of stock, which in no sense a bond for payment of money was; and especially since before that act, the appellant had performed his part and transferred the stock. For the same reason the appellant was not obliged to make it appear, that he was possessed of stock at the time of granting the bond, or six days after. He was ready to prove that at the time he was entitled to a much greater quantity of stock, but he declined to give any account of his particular circumstances, as he apprehends he might justly do.

#### *Heads of the Respondent Ogilvie's Argument.*

The confession of a party would be entirely useless, if he were permitted to add other facts foreign to the question, and that those facts should be taken to be true upon his bare allegation. In this case the appellant acknowledged, that though the bond was expressed to be for money lent, yet it was really given for stock, to be transferred at a future time; and this must be taken to be true. But *he must prove* that the stock was actually transferred. As he hath set forth the matter, several facts must be admitted instead of being proved; first that the respondent ordered him to transfer the stock to Powell; 2dly, That he ordered him to borrow and receive the money upon it; and 3dly, That he ordered him to apply that money to his own use, in discharge of a debt due to him from another person. And after all the appellant admits that the respondent could not have redeemed the stock if it had risen, without an order from the appellant, and which never was given; nor does he pretend that he gave the respondent any note, or receipt whereby the latter might charge Captain Abercromby with the 2000*l*.

The respondent's note was gained from him by surprize, upon the appellant's affirming that he had transferred the stock to Colonel Farquhar, which was not true; and it is contrary to all law, that any one should profit by his own deceit.

It appears even from the appellant's own shewing, that the contract was not performed; for he admits, that he transferred the stock to Powell, not in trust for the respondent but for himself and that part of the stock, viz. 100*l.* was never transferred at all, and as to the other part of the contract, viz. the payment of the money, it is so far from being performed, that the appellant's action is to have a performance of it, and therefore it is plainly within the act; and is void, not having been registered. And as the appellant declined condescending upon what stock he had, it must be held that he had none, and so the contract was also void by the act, on that account.

After hearing counsel *It is ordered and adjudged that the petition and appeal be dismissed, and that so much of the interlocutory sentence or decree as is therein complained of be affirmed; and it is further ordered, that the appellant do pay, or cause to be paid to the respondent Archd. Ogilvie the sum of 40*l.* for his costs in respect of the said appeal.* Judgmen<sup>t</sup>,  
20 April  
1724-

For Appellant, *P. Yorke. Dun. Forbes. Will. Hamilton.*  
For Respondent Ogilvie, *C. Wearg. C. Talbot.*

The respondent Murray in this case, put in a long and special answer, mentioning that the condescendance appearing in his name in Scotland, had been put in without his knowledge or consent.

Thomas Paterfon, Esq.                   -                   -                   *Appellant; Case 113.*  
Charles Cockburn, Esq.               -                   -                   *Respondent.*

11th Jan. 1724-5.

*Mutual Contract. South Sea stock.*—At compromising a transaction relative to South Sea stock, one of the parties grants an obligation to the other, to pay him a certain sum with this proviso, that whereas the obligee intended to sue two of the directors to make void his own bargain, if he succeeded, the obligor was to be free of his obligation. The obligee having got an abatement by compromise from the directors, the obligor was entitled to a proportional abatement.

IN 1720, some transactions took place between the parties, relative to South Sea stock, which was sold by the appellant to the respondent; but every matter relative to the purchase not having been finally arranged, after stock had completely fallen in value, a compromise was made between them, in consequence of which the respondent on the 10th of November 1720, granted the appellant his note, or obligation in the following terms:

“ I promise to pay to Thomas Paterfon Esq., or his executors, and  
“ administrators, 100*l. per annum*, to commence from Christmas  
“ next, in half yearly payments, till the sum of 1000*l.* is paid,  
“ provided I continue in any business under the government of  
“ the yearly value of 100*l. per annum*, otherwise this obligation

“ to be void from the time I am displaced from such business;  
 “ and this obligation to take place and commence again, if at  
 “ any time I am replaced in business under the government, till  
 “ the above sum is satisfied. And whereas Mr. Paterfon intends  
 “ to sue Sir John Lambert, and Sir Theodore Jansen to make  
 “ void a bargain of 6000*l.* South Sea stock, he bought of them  
 “ at 1000*l.* per cent; if Mr. Paterfon succeeds in making void his  
 “ bargain with them, then I am discharged from this obligation;  
 “ if he should not, then this obligation is to be made good by me  
 “ according the conditions expressed.”

The appellant after the date of this obligation made a transaction with Sir John Lambert, and Sir Theodore Jansen, by which he was freed of 42,000*l.* part of the price of said 6000*l.* stock, but 18,000*l.* which he had paid them at the time of the purchase was retained by them; and no suit was brought by the appellant against them. The respondent conceiving himself to be relieved of his obligation in consequence of this transaction, refused to implement the same.

The appellant thereupon in 1723, brought his action against the respondent before the Court of Session, to compel him to make payment of the arrears of the said annuity, and to pay the same thereafter as it fell due.

The respondent insisted, that the appellant in terms of the obligation entered into by the respondent, should have sued the directors to be rid of his bargain, which was a necessary step to validate the respondent's obligation: at all events the respondent contended, that the appellant should communicate to him an ease on his obligation, proportionate to that granted by the directors to the appellant on his bargain with them.

The cause being argued on these points, the Lord Ordinary on the 24th of December 1723, “ found that the appellant's prosecuting the two directors to be free of the 6000*l.* capital stock sold to him at 60,000*l.* was a condition which he ought to have implemented; but found it relevant to subject the respondent to a share of the sum in his obligation, in proportion to the share of the 6000*l.* transacted by the appellant with the directors, that the appellant entered into a transaction with them for a certain sum of money, to be paid by him, to be proved *scriptis*, and assigned the 10th day of February thereafter for that purpose.” And to this interlocutor his lordship adhered on the 26th of the said month of December.

The appellant reclaimed, and after answers for the respondent the Court on the 16th of January 1724, “ adhered to the first part of the Lord Ordinary's interlocutor, finding that Mr. Paterfon's prosecuting the two directors to be free of 6000*l.* capital South Sea stock, sold to him at 60,000*l.* was a condition which he ought to have implemented, but with this quality, that he might also have transacted with them; and found that Mr. Cockburn, by the conception of the obligation pursued on, is entitled to a proportional abatement of the sum of 1000*l.* pursued for effecting to the abatement granted by the  
 “ directors

"directors to Mr. Paterfon, and found the directors giving up the sum of 18,000*l.* to the House of Commons, as the sum paid by Mr. Paterfon to the directors as the price of the 6000*l.* capital-stock, sold by them to Mr. Paterfon, is a sufficient proof of the terms of the transaction; and found it probable by writ or witnesses, as also the terms of the said transaction, "reserving *contra producenda*." And to this interlocutor the Court adhered on the 19th day of February thereafter.

The appeal was brought from "several interlocutory sentences of the Lords of Session of the 24th and 26th of December 1723, and the 16th of January and 19th of February 1724." Entered,  
3 March  
1723-4.

#### *Heads of the Appellant's Argument.*

The agreement between the appellant and respondent was, that in case the contract with the directors should be declared void, and the appellant thereby have the money returned, which he had paid upon the contract, then the respondent should have his note delivered up to him. The only event in which the respondent was to have any benefit, was if the agreement was made void, and it was the only one in which he could desire any benefit; for as the appellant's original agreement with him was for 100*l.* per cent., the same price at which he had agreed with the directors, and the appellant had already compounded with the respondent for 100*l.* there could be no handle for any further agreement or composition, unless the appellant should have made void his agreement with the directors, and received back his whole money, the benefit of which he intended to communicate to the appellant.

It can never be imagined, that the appellant, or any man in his right senses, after he had already given so great an ease to the respondent, as to agree to accept of 100*l.* payable in ten years, and that subject to a contingency, in lieu of 10,000*l.* would agree to communicate to him the benefit of any transaction he might make with the directors, especially if upon the footing of that transaction, the appellant was to pay more than the sum in any event payable by the respondent: in this case the appellant has paid 3000*l.* for every 1000*l.* stock, and the sum payable by the respondent, considering the different times at which it is to be paid, and the contingency it is subject to, cannot be valued at more than 5 or 6 hundred pounds. Since then the appellant pays almost six times as much for every 1000*l.* stock he bought from the directors, as the appellant in any event is to pay for the like quantity of stock, with what equity or justice can the respondent claim any benefit from this transaction, or insist upon a proportional abatement?

The appellant apprehends he was under no necessity to sue the directors, it was entirely optional to him: he did indeed advise with counsel upon his case, and by their advice the transaction was made whereby the appellant lost the said sum of 18,000*l.* it being the opinion of counsel the said agreement would not be voided and set aside. And the appellant believes there are few instances,

instances, where any South Sea contract has been compounded at a more easy rate, than this with the respondent.

*Heads of the Respondent's Argument.*

Since the express condition of the obligation was, *that in case the appellant prevailed in the suit against the directors, the obligation was to be void*, this necessarily implied, that the suit was to be insisted in, and the appellant could not by any voluntary transaction of his, without the consent of, or notice given to the respondent, deprive him of the benefit of that condition; and consequently since the appellant has made such transaction without the consent of, or notice to the respondent, the condition must be looked upon as fulfilled in the respondent's favours.

Upon the supposition, that the appellant might lawfully have compounded with the directors instead of insisting in his suit, then still the respondent ought to have a proportional benefit by that transaction, and since he was to have paid nothing in case the appellant had been relieved entirely of the sum of 60,000*l.* now that the appellant is relieved of 42 parts of the 60, the respondent ought likewise to be relieved proportionally of the 1000*l.* contained in his obligation. If it were otherwise, then it must follow, that if the appellant had paid only 5*l.* to the directors, the respondent must have paid him the whole 1000*l.* which the respondent apprehends is highly absurd.

If it be true, as the appellant has himself affirmed, that the 1000*l.* stock, with which he would charge the respondent, was a part of the 6000*l.* purchased by him from the directors; and if it be likewise true, as the appellant affirmed by a letter under his own hand to the respondent, that he sold the stock, with which he charges the respondent, at 525*l.* per cent., then he gained upon this very 1000*l.* stock, 225*l.* per cent., since by the transaction with the directors, he paid but 300*l.* per cent. for it; and consequently he can have no just demand on this account against the respondent.

Judgment,  
11 Jan.  
1724-5.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the said several interlocutory sentences therein complained of be affirmed.*

For Appellant,	Dun. Forbes.	Will. Hamilton.
For Respondent,	Ro. Dundas.	C. Wearg.



Alexander Bayne, Advocate - - - *Appellant*; Case 114.  
 The Commissioners and Trustees for the  
 Forfeited Estates - - - *Respondents*.

13th Jan. 1724-5.

*Temporary Jurisdiction in the Commissioners for the Forfeited Estates.*—By several acts of Parliament, the claims relative to forfeited estates, were to be entered before the commissioners by a day certain: in certain cases application was to be made to the Court of Session. A person mistaking his remedy, applied to the Court of Session, and obtained a judgment in his favour; but that was afterwards (among many others) annulled by the House of Lords, for want of jurisdiction: he then entered a claim before the trustees, which they refused to consider as not being entered within the time limited: and an appeal to the Court of Delegates was also refused, “leaving the petitioner in his circumstantiate case, to make application for redress to the proper powers.” The judgment of the Court of Delegates is affirmed.

**T**HE Earl of Southesk, attainted for treason, for his accession to the rebellion 1715, was at the time of his forfeiture in possession of the lands of Leuchars Forbes in the Shire of Fife. These lands were seized and surveyed by the respondents, as forfeited by his attainder, and vested in them for the use of the publick. By several acts of parliament, the mode of claiming any right of, into, or out of any of the estates of which any of the forfeiting persons “was, were, or should have been seised, or possessed of, or interested in, or entitled unto, on the 24th day of June 1715, or at any time afterwards in his, her, or their own right, or to his, her, or their own use, or whereof any other person or persons was, were, or should have been seised, or possessed of, or interested in, to the use of, or in trust for them, or any of them, on the said 24th day of June 1715, or at any time afterwards” was directed to be by entering a claim before the respondents within a time limited, and enlarged, by these acts. By the act 4 G. 1. c. 8. this time was 4 G. 1. c. 8.  
 finally enlarged till the 1st of June 1718.

By a subsequent act, 5 G. 1. c. 22. upon a recital, that several doubts had arisen in Scotland, as if the respondents had seized and surveyed certain estates, which were not vested in his majesty for the use of the publick; it was therefore enacted, that it should and might be lawful for any person pretending right to such estates, and that none of the forfeiting persons were seised or possessed of, or interested in, or entitled unto such estates in their own right, or to their own use, to exhibit their exceptions to the Court of Session, setting forth their rights, within the time limited by the act, which the said Court was directed to hear and determine, in manner pointed out by the said act. 5 G. 1. c. 22.

Upon the footing of this act of parliament, the appellant presented his exceptions before the Court of Session, against the seizure and survey of the said lands of Leuchars Forbes: stating

That

That these lands were originally the undoubted property of Forbes of Reres, but he owing very great debts, the lands were adjudged by his creditors : that the creditors being very numerous a factor was appointed, and an action for determining the preferences of the several creditors carried on which was finished in 1714; and afterwards the estate was exposed to publick sale before the Court of Session, and the appellant as the highest bidder was declared the purchaser, and obtained a decree of sale in 1719 :

That James late Earl of Southesk having right to some debts charged upon the premises, and being cautioner for the factor, upon his death had got into possession thereof, which he held at the time of his attainder ; and the appellant, thereupon, claimed the estate to be decreed to him.

To these exceptions the respondents put in answers ; and, after a hearing upon the question, the Court of Session, “ sustained the “ appellant’s right, and declared the estate in question to belong “ to him.” But the respondents having brought their appeal from that, and many other of the like decrees then pronounced, to the House of Lords ; their lordships, in regard it did appear, and was admitted, *that the late earl was in possession of the estate at the time of the treason committed*, declared void the said decree of the Court of Session, in respect they had no jurisdiction to judge upon such exceptions.

After this the appellant applied by petition to the respondents, praying that they would hear and determine upon the matter of the appellant’s exception and right to the said lands ; and the respondents upon considering the said petition on the 10th of October 1720, refused the desire thereof, in regard, the words of the said act of the 5th of the King, were not sufficient to warrant them to take on themselves a jurisdiction, to hear and determine the merits of the appellant’s right, no claim for the same having been entered in due time, according to the directions of the acts of parliament in that behalf. The appellant then tendered to the respondents an appeal, to be by them, together with the appellant’s reasons of appeal, transmitted to the Court of Delegates<sup>(a)</sup>; but they refused the same, since their decree was only upon a petition, and not upon a claim duly given in.

The appellant thereupon applied by petition to the Court of Delegates, praying them to take his right under their consideration and to hear and determine the same ; and he enforced the prayer of his petition on this consideration, that the foundation on which the respondents refused to transmit the appeal, (viz. because he was not properly a claimant, and therefore that the judgment given upon his petition was not subject to the same rules, as judgments upon claims,) was the very matter in dispute,

(a) By the act 4 G. 1. c. 8. power was given to his majesty by commission under the great seal of Great Britain, to appoint five of the English Judges to be a Court of Delegates, and of record in England; and five of the Scots Judges to be a Court of Delegates, and of record in Scotland, to hear and determine appeals from the decisions of the commissioners for forfeited estates.

and was properly to be determined by the said Court. But the Court of Delegates, having advised this petition with answers made thereto for the respondents, on the 24th of January 1724, "refused the desire of the petition; leaving the petitioner to make his application in his circumstantiated case for redress to the proper powers."

The appeal was brought from "a sentence or decree of the Court of Delegates in Scotland, made the 24th of January 1724."

Entered,  
24 Feb.  
1723-4.

### *Heads of the Appellant's Argument.*

The act of the 5th of George the 1st, as it gives a power and liberty to every person, who pretends a right to the estates in question, and that the forfeiting persons were not seized, or possessed thereof, to present exceptions together with the grounds thereof, to the Court of Session, with power to determine thereon; so if the case of the exceptant should be such as a claim might have been entered for before the respondents, or if it appeared that the forfeiting person was in possession, &c., then the Court of Session is discharged from determining thereupon, and *the same* is to be heard and determined by the trustees in the manner directed by the act of the 4th of the king. By these words, *the same*, are meant, as the appellant conceives, the exceptions which the Court of Session are not empowered to determine; and therefore this act gave the respondents a power to determine upon such exceptions as were presented to the said Court of Session, and of which that Court could not properly determine.

All penal laws are to be strictly interpreted; and though any person claiming any interest out of a forfeited estate, was to enter a claim; yet that does not oblige the person who has a right to the estate itself, and to which he thinks the forfeiting person had no right, to enter any claim: for none of the words used in the act directing claims to be entered, import so much; and this is the appellant's case, who insists on a title to the estate in question, not under the forfeiting person, but as a *bonâ fide* purchaser at a judicial sale, paramount to him, and insists that the forfeiting person though in possession had no title at all.

The respondents cannot give themselves any absolute jurisdiction, when it is limited by law, and subjected to the review of a superior court; and if they refuse to transmit an appeal, the Court of Delegates may interpose and judge whether the refusal is reasonable; for otherwise, even in cases where a claim was regularly entered, they might refuse to transmit the appeal and so make the Court of Delegates quite useless; and therefore that Court must judge how reasonably the respondents refused to transmit the appeal in this case. If the appellant has a right, it were hard, that he should lose his estate without any fault, or that the publick should enjoy this estate without any right to it. What the appellant humbly desires, is to have his right examined; if he had a right and was a purchaser of that right for a valuable consideration,

sideration, it were hard to deprive him of the opportunity of having it enquired into, that his property may not be lost.

*Heads of the Respondents' Argument.*

The respondents conceive, that it is unnecessary for them to enter into the consideration of the appellant's title, further than to say, that a decree of sale pronounced by the Court of Session, in February 1719, could not affect any forfeited estate. The appellant's pretended right, and the rights of the pretended creditors, in whose names the estate was decreed to be sold are declared void by the express words of the statute 4 Geo., *because no claim was entered for the same, within the times limited by that and subsequent statutes.* Though they are a Court of record and have jurisdiction the same is limited to the particular matters mentioned in the statute; that is, they have a power to determine claims upon forfeited estates, entered within the times limited by the several acts made in that behalf; but were not empowered by any act of parliament to receive, hear, or determine upon any claim, unless such claim was entered before those times, and the words of the act giving them jurisdiction are express to this purpose. No clause in the act of the 5th of the king does enlarge the time for entering claims before them, nor does it extend their jurisdiction further, than as by the said act of the 4th of the king: on the contrary it gives a part of the jurisdiction formerly in them to the Court of Session, and leaves the other part of their jurisdiction in the same condition it was by the said act of the 4th of the king.

By the same act of the 4th of the king, the determinations and decrees of the respondents were declared to be final and binding upon all parties concerned, except the claimant, or claimants, should enter his, her, or their appeal against such decree or determination, within 20 days after the same should be made: and in case of such appeals so entered, the commissioners and trustees were required to transmit the same to the Court of Delegates in the manner by that act likewise directed; and the Court of Delegates were thereby empowered finally to hear and determine such appeals. But this power given to the commissioners to review and transmit appeals, and to the delegates to determine thereon, was only upon claims entered in pursuance of some of the said acts.

Judgment,  
23 Jan.  
1724-5.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the decree or sentence respecting the petition of the appellant and therein complained of be affirmed.*

For Appellant, *Dun. Forbes. Will. Hamilton.*  
For Respondents, *P. Yorke. Re. Dundas.*

*Ex parte*

Thomas Brand, of London, Goldsmith (a), *Appellant*; Case 115.  
Sir Alexander Cumming, of Coulter, Bart. *Respondent*.

27 Jan. 1724-5.

*Promissory Note*.—It is objected to a promissory note, that it was not holograph, nor signed before witnesses, and that therefore the signing and payment of the money ought to be proved: but it having been granted in London, the objections are repelled.

A partial payment was to be deducted, first out of the interest, and afterwards out of the capital. (These before the appeal.)

*Usury*.—*Process*.—A defender having alleged usury against a promissory note granted to the pursuer, the pursuer a goldsmith or banker in London, is ordered to confess or deny the facts, and a commission is granted to Lord Chief Justice King, to take extracts from his books he residing in London.

*Foreign*.—A person residing in London, brings action on a promissory note in Scotland, against which usury is pleaded; the clerk is ordered to retain the note in Court, till the pursuer should transfer to his agent in Scotland, a collateral security in stock which had been granted by the defender.

ON the 20th of June 1720, the respondent then in London, granted to the appellant his promissory note for 3000*l*. mentioned to be for value received, payable one month after date; and he deposited with the appellant, two receipts in the first subscription then taken in by the South Sea Company for 500*l*. each. For these the appellant granted receipt in the following terms, “Received of Sir Alexander Cumming Baronet, two South Sea “first subscriptions for 500*l*. each, which I promise to return on “payment of 3000*l*., on or before the 20th of July next, and “in default thereof am empowered to sell the same at market “price, and be accountable to him for the surplus, if any, the “first and second payments being made thereon.”

The appellant sometime afterwards brought his action before the Court of Session, against the respondent upon the said promissory note, in which he stated, that at the request of the respondent he had continued payment of said note, first to the 25th of August, and then to the 25th of September following, having during that time received payment of 360*l*. part thereof; and that though the appellant several times pressed the respondent, that he might be at liberty to sell the said two subscription receipts, yet he declined to consent thereto.

This cause coming to be heard before the Lord Ordinary, the respondent at first took an objection, that the note not being of his hand writing, nor signed before witnesses, the appellant ought to prove the signing of the note, and payment of the money. The appellant answered, that the note being granted in London, and bearing to be for value received, the appellant was not obliged to prove the payment of the money nor the respondent's signing the

(a) The goldsmiths were at that period also frequently bankers, as the appellant appears to have been.

note, unless he would deny, that he had signed it. The respondent having failed to confess or deny whether the note was granted in London, as directed by the Lord Ordinary, his Lordship on the 12th of July 1723, "repelled the nullity objected, "in respect of the answer, and held the respondent as confessed, "that the note was signed in England; and in respect the respondent refused to prove his defence habilly, decerned con- "form to the conclusions of the libel."

Against this interlocutor the respondent presented a representation, insisting that the note was void, because, as he stated, the appellant had taken more than legal interest, and at the rate of six per cent. per month. This the appellant denied, and the Lord Ordinary on the 30th of July 1723, "found that the "appellant having acknowledged that there was 360*l.* of the "sum on the note paid by the respondent, the same was to be "deducted from the interest due on the said note for the time, "and the remainder out of the capital; and before answer allowed the respondent to prove *scripto* or by witnesses, that at "granting the said promissory note there was interest at the rate "of 6 *per cent.* for one month's forbearance, accumulated and "inserted in the said note, whereby the sum in the note was "made 3000*l.*; and that thereafter, and for the two several and "subsequent months that the payment of the aforesaid note was "continued, there was paid at each of the said continuations a "premium or interest at the rate of 6 per cent for the month:" and granted a commission for examining witnesses, and allowed the respondent to prove *scripto* so far as he should not prove by witnesses.

Against this interlocutor a reclaiming petition was presented for the respondent, and after various proceedings, the Court, on the 23d of January 1724, "ordained the appellant to confess or deny "how much of the sum of 3000*l.* was delivered by the appellant to "the respondent, and whether upon the 20th of July and 25th of "August 1720, he received the sum of 360*l.* in two moieties; and "directed the appellant's agent to declare what he knew in relation to these facts." And on the 7th of February thereafter, the Court, "ordained either party to give in confessions of the "special facts alleged by either, and granted commission to inspect the appellant's books, and take excerpts out thereof of "what may concern any of the points in the confessions, "and transmit these excerpts with the report of the commission, and also to take the depositions of witnesses.

The respondent gave in a confession and the appellant claimed against the last interlocutor; and after answers the Court on the 20th of February 1724, "sustained the promissory note "to be a good title of action; and before answer as to the other "points allowed a probation of the several facts in the respondent's confessions given in; and granted a commission "to the Lord Chief Justice King, to examine witnesses, and "make inspection of the appellant's books, and take excerpts therefrom of all such facts as relate to the points contained in "the confession, reserving to the Lords in case of the appellant's

“ appellant’s refusing to produce his books, to consider the import thereof at advising the probation; and reserving to themselves after probation, the consideration whether or not, upon the respondent’s failing of payment upon the day, to which the payment was last continued, the appellant was necessarily obliged to sell out at market price, the two South Sea subscriptions, deposited in his hands, towards payment of the sum for which they were deposited.”

The respondent afterwards presented a petition praying that the Court would ordain the clerk of the process to keep in his custody the promissory note granted to the appellant; and ordain the appellant to exhibit and produce in the clerk’s hands, the two deposited subscriptions of 500*l.* each, or to transfer to the clerk such stock as came in place thereof. After answers for the appellant, the Court on the 25th day of February 1724, “ ordained the appellant to transfer to John Hamilton his factor, this stock which came in place of the subscription, to be made forthcoming, as the Lords in the event of the process should find just; or otherwise to find caution to make the same forthcoming betwixt and the said day; and discharged the clerk to give up the promissory note, until such time as the deposit was transferred, or caution found by the appellant as aforesaid.”

The appeal was brought from “ several interlocutory sentences of the Lords of Session of the 23d of January, 7th, 20th, and 25th of February 1724.”

Entered,  
14 March  
1724.

#### *Heads of the Appellant’s Argument.*

As the transactions in question happened in England the appellant conceives, that the judgment of the Courts in Scotland, ought to be agreeable to the laws and customs of the place where the transaction was entered into.

He conceives further, that he was neither obliged by the laws of Scotland, nor of England, by himself, or his attorney or agent, to confess how much of the 3000*l.* was paid to the respondent, unless the respondent at same time offered that the note should stand as a security for the money really advanced, and agreed to pay what was really lent, and to waive all penalties.

The examination and inspection of the appellant’s books, for which the commission was granted, was to oblige him, if what the respondent stated were true, to produce evidence to convict him of usury, by which he might be subjected to penalties in England, as well as to the loss of a large sum of money in Scotland, and this without directing any allowance to be made to him of the money that should appear by the books to be inspected, to be really and *bona fide* lent to the respondent. The appellant contends, that this part of the judgment is contrary to the known rules of proceedings in all Courts, and inconsistent with the common rules of justice.

The interlocutor of the 20th of February, which grants a commission, reserves to the Court a power of determining whether the appellant was necessarily obliged to sell the subscriptions on the

respondent's failure to pay the money; but this leaves the whole cause as open and unsettled after the examination of witnesses and production of books, as if no such proceedings had been; so that all the expence and delay to be thereby incurred might be fruitless.

The enjoining the appellant to transfer the South Sea stock, arising from the two 500*l.* subscriptions, (which covers but a small part of the debt), or otherwise to find caution to put the same out of his own power; and the ordaining the clerk, not to give up to the appellant the promissory note entrusted in his hands, are apprehended to be very hard and unusual. They tend to strip the appellant of all means of ever obtaining satisfaction from the respondent, and make him quit the only security he has for payment of a small part of the money due.

Judgment,  
27 Jan.  
1724-5.

This day being appointed to hear counsel upon this petition and appeal, counsel accordingly were called in to be heard; and counsel appearing only for the appellant, proof was made of the due service on the respondent's agent of the order for hearing the said appeal; and thereupon the counsel for the appellants were heard, and due consideration had of what was offered in relation to the cause.

*It is ordered and adjudged that the said petition and appeal be dismissed, and that the several interlocutory sentences therein complained of be affirmed.*

For Appellant, C. Talbot. Will. Hamilton.

Cases

*On three Appeals.*

116, 117,  
118.

The Commissioners and Trustees for the  
Forfeited Estates, - - -

*Appellants;*

George Lockhart of Carnwath, Esq; -

*Respondent.*

6th Feb. 1724-5.

*Presumption-Bond.*—Bonds of pension granted to an advocate, afterwards President of the Session, during his continuance to be an advocate, are sued on, after his death by his son, as wholly remaining due, after the lapse of a good many years from their dates; and are sustained till the date of the grant's becoming President of the Session, his son giving his oath of criminality and any payments made on the debts acclaimed.

1st appeal.

ROBERT Earl of Southesk, deceased, on the 28th of April 1674, granted a bond of pension to Sir George Lockhart, the respondent's father, for the payment of 300 marks yearly to him, his heirs, executors, and assignees, during his continuance to be an advocate, by two half-yearly payments, the first commencing at Martinmas 1674.

The



The respondent's father continued to practise as an advocate, till the 1st of January 1686, when he was made Lord President of the Session. He died in 1689, leaving the respondent, his son, about eight years of age; the respondent was confirmed executor to his father, by the commissaries of Edinburgh, on the 23d of January 1690.

After the attainder of James late Earl of Southesk, and seizure of his estate real and personal by the appellants, the respondent entered his claim before them on the said bond, for the said sum of 300 merks yearly from Martinmas 1674 to January 1686.

This claim came to be heard before the appellants, on the 1st of September 1719, when they were pleased to disallow and dismiss the same.

The appellant thereupon appealed to the Court of Delegates, who, after hearing counsel for both parties, on the 3d of March 1724 "reversed the decree of the said commissioners, with this quality, that the respondent do make up proper titles in his person to the said debt, before he receive debentures from the appellants, and also give his oath of credulity as to any payment made of the debt acclaimed, and restrict the said claim to the time till the said Sir George Lockhart was made president of the Session."

The first appeal was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724."

Entered.  
23 March  
1723-4.  
2d appeal.

An appeal, of a nature precisely similar, was at same time presented by the appellants on the following case:

George Earl of Marischal, deceased, on the 10th day of March 1673, executed a bond to the said Sir George Lockhart, reciting, that he having many experiences of the sound and wholesome advices and good services done to him by his trusty and faithful friend Sir George Lockhart, advocate, his ordinary advocate and counsellor, in his affairs and business at law; and being very sensible of the trouble and pains he was put to therein, and being desirous in some measure to remunerate his kindness, and trusting he would continue the same towards him, therefore he obliged himself to pay to the said Sir George Lockhart, his heirs, executors, or assignees, the sum of 400 merks Scots money, in name of pension, yearly, in time coming during the said Sir George's continuing to be an advocate.

A claim, similar to that in the first appeal, was entered by the respondent, on the forfeited estate of the Earl of Marischal, on account of this bond, which, on the 16th of September 1720, was disallowed by the appellants; but, upon an appeal, the Court of Delegates, on the 3d of March 1724, reversed the judgment of the appellants, and decided as in the first appeal.

The second appeal was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724."

Entered.  
23 March  
1723-4.  
3d appeal.

The appellants also presented a third appeal, on the following case:

Alexander, late Earl of Linlithgow and Callender, deceased, on the 11th of February 1675, executed a bond for paying to the

said Sir George Lockhart, during all the days of his lifetime, at least during his continuing to be employed in his affairs, and until the said pension should be recalled and discharged, the sum of 400 merks Scots yearly.

The respondent made a claim similar to the two former on the forfeited estate of the Earl of Linlithgow and Callender, on account of the last mentioned bond; but his claim was dismissed by the appellants on the 20th of August 1720. He brought his appeal to the Court of Delegates, who, on the said 3d of March 1724, reversed the judgment of the appellants, and decided as in the two former appeals.

Entered,  
23 March  
1724-4.

The third appeal also was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724."

#### *Heads of the Appellants' Argument.*

The decrees of the Court of Delegates are founded on a supposition, that the annual pensions are in arrear, and unpaid, from the time of granting the respective bonds; and, that no part was ever paid to Sir George Lockhart, which is conceived to be incredible.

For these bonds have never been put in suit, nor has any diligence been done for non-payment of the said yearly pensions; neither by the respondent's father, nor his tutors or curators, during his minority, nor by himself since he came of age, except entering the aforesaid claims; and no proof was offered, or brought, of any service performed by the said Sir George Lockhart, to any of the said earls, who granted the bonds claimed, nor of any arrears resting in respect thereof, though the condition of granting one of these bonds was expressed to be for services to be done; and the Earl of Callender, grantor of one of the bonds, died long before the respondent's father. Such pensions are in use to be paid annually, though it be impossible in the present case to recover the releases of such annual payments. Besides, when the respondent, or his tutors, made up titles in his person to the personal estate left by his father, no notice was taken of the sums now claimed.

#### *Heads of the Respondent's Argument.*

As the bonds in question are admitted to be regularly executed, they are not to be taken away by presumptions of any kind. If a bond is not sued for in 40 years after its date, it is then barred by the statute of limitations in Scotland; but if any action is commenced in that time, nothing can take away the bond but an actual proof of payment; for as the obligee is not obliged to sue, his having the original bond in his possession, is a presumption of non payment; and if such action be commenced in 40 years, the obligee will be entitled to recover payment.

It is true, the earliest of these bonds was executed in 1673, and the last yearly sums payable upon all of them became due in 1686; but the respondent was 12 years of the time a minor, and 1617. c. 2. it is expressly provided by act of parliament 1617, c. 12. "That  
" in

" in the course of the said 40 years' prescription the years of  
" minority and less age shall no ways be counted, but only the  
" years during the which the parties against whom the prescrip-  
" tion is used and objected were majors, and past 21 years  
" of age."

The respondent's claim was entered in 1718, not quite 19 years after the last payments became due on the bonds, including the years of the respondent's minority, nor above 33 years from the date of the oldest bond, exclusive of his minority.

There is no necessity for the respondent's proving, that his father rendered any service as an advocate to the late Earl of Southesk. Bonds of this kind are given merely as retaining fees, and are payable whether any service be done or not. The recital of this bond is for *certain good deeds done and performed, and to be done and performed*, and the pension thereby granted is payable to Sir George Lockhart, his heirs, executors, and assignees, *during his continuing to be an advocate*; which plainly shews, that any proof of service rendered was not necessary; and, indeed, in the nature of this case, such proof cannot be had.

Such pensions are seldom or never paid annually; on the contrary, they are frequently and usually left unpaid for a great many years together. In the case Mrs. Black and Sir Peter Fraser, upon an appeal, it was determined that the pension should be paid though a great many years in arrear.

No. 47. of  
this Collec-  
tion.

It is of no moment that discharges cannot now be easily recovered, for that will be an argument against all debts that are sued at any distance of time: and, on the contrary, it is to be presumed, that the obligee having the bond, the debt is not satisfied unless discharges are produced.

After hearing counsel on the first appeal, *It is ordered and adjudged, that the same be dismissed; and that the decree therein complained of, with respect to the bond claimed by the respondent, alleged to have been given to Sir George Lockhart, his father, by Robert late Earl of Southesk, be affirmed.*

Judgment,  
6 Feb.  
1724-5.

A similar judgment was separately pronounced, of same date, in the two other appeals.

For Appellants, P. York.

C. Wearg.

For Respondent, C. Talbot.

Wm. Hamilton.

Case 119. The Commissioners and Trustees of the Forfeited Estates, - - - - - *Appellants;*  
 Elizabeth Stevenson, Widow of Archibald  
 Pitcairn of that Ilk, Doctor of Medicine, *Respondent*

13th Feb. 1724-5.

*Treason—Obligations granted in Prison before Trial.*—The Earl of Winton, while in prison previous to his trial and attainder for high treason, granted receipts bearing to be for money advanced to him, but these are not allowed in whole.

It is found, however, that he was entitled to be alimented out of his due at that period, and to apply money to the expenses of his trial, and for his maintenance in prison for three months; and for such expenses a sum of money (2972*l.* 3*s.*) is modified.

**G**EORGE, late Earl of Winton, was taken prisoner, amongst the rebels, at Preston, on the 13th of November 1715; and committed to the Tower on the 10th of December following. Upon the 21st of January 1716, the earl, while in confinement in the Tower, granted a factory to the respondent for levying the rents of his estate; in virtue of which she, according to her own acknowledgment, received to the amount of 1135*l.* 5*s.* 10*d.* sterling. The earl also delivered to the respondent two receipts for money, the one for 1000*l.* bearing date the 6th of February, and the other for 4000*l.* bearing date the 16th of same month; and obliged himself to allow those sums to the respondent at discounting. He was afterwards attainted of high treason, upon an impeachment before the Lords in Parliament, and his estate was vested in the appellants for the use of the public.

The respondent afterwards entered a claim as a lawful creditor before the appellants, in terms of the act 1 *Geo.* 1. "appointing commissioners to inquire," &c., charging herself with the said sum of 1135*l.* 5*s.* 10*d.* as received of the rents of the Earl of Winton's estate, and claiming the sum of 3879*l.* 13*s.* 2*d.* as the balance remaining due upon the said receipts of cash advanced by her to the earl. This claim being heard before the appellants, they, on the 17th of September 1719, "Found that the said receipts or bills were given to the respondent by the late Earl of Winton, after the articles of impeachment were exhibited against him, and during the time of his trial, whereon he was convicted and attainted, and no proof offered of the valuable consideration; and therefore dismissed the said claim."

The respondent presented her appeal to the Court of Delegates against this judgment of the appellants; and, after a hearing of the cause, the Delegates, on the 1st of March 1723, "Reversed the judgment of the appellants, and found that the said late earl was, during the time of his imprisonment at London, entitled to be maintained and supplied out of his means and estate  
 " for."

“ forfeited, in so far as was necessary for his said maintenance  
 “ and defence in the criminal prosecution for high treason car-  
 “ ried on against him; and remitted the respondent's claim to  
 “ the appellants in order to take further evidence of the respon-  
 “ dent's having advanced money to the said late earl, and to con-  
 “ sider what sum or sums of money should be modified as the  
 “ necessary maintenance and supply of the said late earl, during  
 “ his said imprisonment and criminal prosecution aforesaid; and  
 “ in so far as they should find the same equitable, to state that  
 “ sum as a debt upon the means and estate of the said late earl  
 “ attained.”

The respondent now brought evidence on her part of the fur-  
 nishings to the earl, and the appellants, upon considering the  
 same, on the 14th of October 1723, “ Found that the respon-  
 “ dent did, during the imprisonment of and criminal prosecution  
 “ against the said late Earl of Winton, remit and pay to his use  
 “ several sums of money; but that the sum of 2059*l.* 1*s.* 8*d.*  
 “ sterling was sufficient for his necessary maintenance during  
 “ such his imprisonment, and for his defence in the said criminal  
 “ prosecution for high treason carried on against him; and as it  
 “ appeared to them that the Lords Delegates by their decree,  
 “ dated the 14th of December 1722, made upon the appeal of  
 “ Charles Menzies, the said late earl's solicitor in parliament,  
 “ against a decree of the appellants, which they thereby re-  
 “ versed, had found the said Charles Menzies a just and lawful  
 “ creditor on the said estate for the sum of 216*l.* 3*s.* sterling;  
 “ and that the respondent by her said claim had acknowledged  
 “ the receipt of 1135*l.* 5*s.* 10*d.* sterling, after deduction of her  
 “ charges, and exchange of remittances, which sums of 216*l.* 3*s.*  
 “ and 1135*l.* 5*s.* 10*d.* they decreed to be deducted out of the  
 “ said sum of 2059*l.* 1*s.* 8*d.*, which reduced the same to  
 “ 707*l.* 12*s.* 10*d.* which they decreed to the respondent in full  
 “ of her said claim, and of all demands she had against the said  
 “ late earl's estate.”

The respondent presented a second appeal to the Court of De-  
 legates; and after sundry proceedings, they, on the 9th of March  
 1724, “ Found that to the sum of 707*l.* 12*s.* 10*d.* of balance  
 “ found due to the respondent, there be added the sum of 913*l.*  
 “ 1*s.* 4*d.* in lieu of her expences on the said late earl's trial, and  
 “ maintenance whilst in prison, both which sums extended to  
 “ 1620*l.* 14*s.* 2*d.* sterling; and found that this sum of 1620*l.*  
 “ 14*s.* 2*d.* is to bear interest from the 2d day of August 1716;  
 “ and remitted to the respondents to issue debentures ac-  
 “ cordingly.”

The appeal was brought from “ a decree of the Court of De-  
 “ legates in Scotland of the 9th of March 1724.”

Entered,  
 25 March  
 1724.

#### *Heads of the Appellants' Argument.*

By the decree of the Delegates the Earl of Winton's estate is  
 charged, to the prejudice of the public, with no less than 2972*l.*  
 3*s.* sterling for his maintenance in prison for three months, and

the expences of his trial, without any evidence that any such sum was applied in that way: and the appellants conceive, that the sum of 2050*l.* taxed by them, was more than sufficient for these purposes.

The Court of Delegates has decreed to the respondent the sum of 2756*l.* counting what she levied out of the estate; whereas by her own evidence, lame as it is, no more appears to have been advanced by her to the earl than the sum of 1312*l.*

It does not appear, that the money in question was advanced for the earl's maintenance before his attainder, or his defence on his trial; but from the circumstances of the case, it is more probable, that it was taken up by him to bring about his escape, and to support him abroad after his attainder.

The real estate of the forfeiting person is by act of parliament vested in his majesty from the 24th day of June 1715; and the power given by that act of entering claims to charge such real estate, is only for rights, debts, or incumbrances affecting the same, before the day whereon it is vested in his majesty: but the debt claimed in this case, is not pretended to have been incurred till several months after that day.

#### *Heads of the Respondent's Argument.*

The appellants admitting that the late earl was entitled to be supplied out of his estate during his imprisonment, so far as was necessary for his maintenance and defence, it is not material that the said receipts bear date after the 24th of June 1715, from which period the estate was to be vested in his majesty, or the 23th of November 1715, from which period the earl was to stand attainted. It appears by sufficient evidence, that the said receipts were executed by the earl, before his attainder, at the times they respectively bear date.

The respondent has brought as sufficient evidence, as the nature and circumstances of this affair would admit of, that she really and truly advanced more money than is decreed to her; and her evidence was such as fully to satisfy the Court of Delegates. And since the earl's maintenance and expences of his trial must have amounted to a very considerable sum, and as the remittances are proved to have been made to him on that account by the respondent only; there can be no doubt but that the money was truly applied to that use.

The respondent, also, having advanced all the said money claimed by her in the beginning of the year 1716, and being herself obliged to pay interest for what she still stands indebted, there was just ground for the Court of Delegates giving her interest for what she so advanced.

After hearing counsel, *It is ordered and adjudged, that the decree of the Court of Delegates complained of in the appeal, whereby the said Court found and adjudged, that the sum of 913*l.* 1*s.* 4*d.* sterling should be added to the sum of 707*l.* 12*s.* 10*d.* sterling, decreed to the respondent by the appellants the said 14th day of October 1723, be reversed; and that the said judgment and decree*

*Judgment,  
13 Feb.  
1724.*

*given*

given by the appellants, allowing the said 707l. 12s. 10d. to be affirmed.

For Appellants, P. Yorke. Ro. Dundas.  
For Respondent, Will. Fraser. G. Talbot.

The Governor and Company of Undertakers for raising Thames Water in York Buildings,  
John Haldane, Esq;

Appellants;  
Respondents.

Case 120,  
Edin.  
29 Dec.  
1724.

14th April 1725.

*Jurisdiction.*—The York Buildings Company, which had purchased large estates in Scotland, was liable to be sued in that country, in a personal action relative to a transfer of stock, though such transfer could only be made in London.

IN February 1724, the respondent brought an action against the appellants before the Court of Session, setting forth, that in the month of June 1720, the respondent having occasion for money at London, borrowed 3000l. sterling from the appellants, and as a security for re-payment of the same, caused one Gibson, who held stock in his name in trust for the respondent, to transfer 6000l. of the appellants' capital stock, into the hands of the appellants, pursuant to their public advertisements at that time for lending of money for a month :

That the respondent being obliged to go to Scotland before the 21st of July, the day when the 3000l. became payable, made a proposal to the appellants to pay the same to their agents in Scotland, the 6000l. stock being to be retransferred to his trustee by the appellants; which being agreed to, a bill was drawn on the respondent, dated 21st July 1720. for 3147l. 18s. 10d. payable to the appellants' agents at 14 days' sight, which the respondent accepted on the 27th of July at Edinburgh, and duly paid on the 10th of August following :

That this payment being made, and the conditions on the respondent's part fully performed, upon the faith and belief that the 6000l. stock, pledged with the appellants, was by them retransferred to him or his trustee; the respondent conceived that he had no more to do, but to order the same to be sold as his occasions required; but instead thereof, and when the respondent ordered the same to be sold at 150 per cent. (which price that stock yielded after the said 10th of August) he found no stock in his or his said agent's name, in the appellant's books; but that the same was disposed of to the use of the appellants :

That after many fruitless applications on the respondent's part, to have justice done him in an amicable way, he was at last obliged

obliged to bring the present action: and he concluded, that the appellants ought to be found liable to pay 6000*l.* to the respondent, being the value which the said 6000*l.* capital stock would have yielded, had justice been timeously done to him in retransferring the said pledge, and if the same had been sold as he intended and directed.

The appellants state, that though they had a very good and proper defence against the said demand, had it been thought advisable to enter into the merits of the cause in the Court of Session; yet they, conceiving that an action of this nature could not be brought against them in the said Court, gave in a declinature of the jurisdiction; and insisted that the appellants did not reside within the jurisdiction of that Court, but had their residence at London, and were thereby subject to the English courts; and that if the respondent had any demand against them, he must sue them in England; especially since the demand in the present case was for an account of the transfers of their stock.

In answer the respondent contended, that the appellants were capable of acting in Scotland; that they had purchased considerable estates there; and so were subject to the jurisdiction of the Scotch courts.

This cause being heard before the Lord Ordinary on the 16th of July 1724, his lordship, by interlocutor of that date, took it to report to the whole Court. Having reported the same accordingly, the Court, after advising mutual informations for the parties, on the 29th of December 1724, "Sustained process at the respondent's instance against the appellants." And upon advising a reclaiming petition presented by the appellants, the Court, on the 16th of January 1725, "refused the desire of the petition, and adhered to their former interlocutor."

The appeal was brought from "two interlocutory sentences of the Lords of Session, made the 29th of December 1724 and 16th of January 1725."

Entered,  
5 Feb.  
1724-5.

#### *Heads of the Appellants' Arguments.*

This action was not proper to be sued against the appellants in the Court of Session, the appellants being a body corporate, and subsisting in England, whereby they were subject to another jurisdiction; and this the more especially since the respondent makes his own case to be that the money was borrowed at London; and that the security given was by a transfer of stock in the books of the York Buildings Company, which are kept at London, and, by the constitution of the company, are necessarily kept there. The present demand of the appellant is not relating to any estate or effects belonging to the appellants in Scotland, nor an action immediately to affect, by way of execution, any such estate; but merely a personal action for constituting a debt alleged to arise from a complicated transaction in another country: and the appellants conceive that such action ought regularly to be sued before the judge of the place of their residence, or where the cause of action arises.



Though the company have agents in Scotland for their lands there, yet they have no office in that country for transferring stocks, about which the present question is; nor can they do any act in Scotland in relation to stock. The company having purchased estates in Scotland no doubt subjects them to the jurisdiction of the courts there in all actions relating to these estates; but not to any personal demand against them, especially such as the present case. Where a debt is liquidated against the appellants, they may be sued in Scotland, so as to make that debt a charge upon their lands in that country; because an estate cannot be charged but by some jurisdiction to which it is subject; yet the present case is very different, for it is to commence a personal action to have the appellants found liable in a debt, which has not hitherto in any manner been established.

The incorporation of the York Buildings Company, and the directions relative to the management of their affairs, are by act of parliament; and they are limited to meet and transact their business in or near York Buildings: and though, under the sanction and encouragement of divers acts of parliament, they have become purchasers of the greatest part of the forfeited estates in North Britain, by which the public has received great benefit; yet if it could have been apprehended, that such purchases in that part of the kingdom, would have subjected their transactions at London, relating to loans of money and transfers of stock, to suits and actions in the courts of judicature in Scotland to be commenced there by any one at pleasure, the appellants conceive that it cannot be reasonably supposed, that they, or any other corporation in South Britain, would have engaged in any such purchases.

But since the courts in England are open, since the transaction was in England, and the respondent now resides there, if he have any just demand, no doubt he will procure satisfaction in the courts in *Westminster-hall*; and the appellants submit to answer any demand he has against them in any of those courts: but they hope that they shall not be obliged to answer in Scotland for transactions concerning transfers of stock at London.

#### *Heads of the Respondent's Argument.*

Though the appellants have their chief residence in England, yet they are proprietors of a very great landed estate in Scotland; in virtue whereof, they are subjects and vassals of the crown of Scotland, and, as such, liable to all the consequences in point of jurisdiction, that attend such vassalage. By the constitution of Scotland, all the vassals of the crown are liable to give suit and preference to the king in his courts, either by themselves personally, or by their attorneys; and to answer to such matters and things as lawfully can be charged upon or brought against them. Though such vassal may happen in fact to be out of the realm, yet he is understood in the eye of the law, to have  
left

left his procurator or attorney within Scotland: and hence it is, that though a vassal be actually absent from the realm, he is amenable to the king's courts by a particular summons at the market-cross of Edinburgh and pier and shore of Leith, as much as if he were at the time present within the kingdom.

If the appellants admit, as needs they must, that though absent from Scotland, they are as much subject to the summons of the king's courts there, as if they were actually present, because they are vassals to the crown in that kingdom; then the distinction betwixt real and personal actions is vain; because, being subject to the jurisdiction, and actually sited in judgment in a legal way, they cannot refuse to plead to any just demand that is brought against them: nor is it possible to affect their real estate, which they admit ought to be affected, for their debts, until the debt be established by a personal action in the courts in Scotland. For, though the debt in question were constituted and established by a judgment of any of the king's courts in England, that judgment could not legally produce any execution against the real estate of the appellants in Scotland; nor could their real estate there be affected in consequence of that judgment, without previously recovering a fresh decree of constitution in Scotland upon a summons, such as is the foundation of the present suit.

Nor will the suing the appellants in Scotland put them under the necessity of transporting their books, minutes, officers necessary to give evidence, and accounts into that country; for, by the course of proceeding in the Court of Session, witnesses may be and are daily examined by commission in England, and extracts and abstracts of books are taken.

Judgment,  
24 April  
1725.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed.*

For Appellants,	P. Yorke.	C. Wearg.
For Respondent,	Dun. Forbes.	C. Talbot.

William Duff of Braco, Mr. Leslie of  
Melrose, and Others, - - - Appellants;  
The Right Honourable David Earl of  
Buchan, - - - Respondents.

Case 121.

15th April 1725.

*Reduction Improbation.—Union.*—The defenders in a reduction improbation having objected to the pursuer's investiture, which was taken at the Castle of Banff, by dispensation in a charter of 1625, that by a posterior charter that castle was disjoined from the barony; the Court found that objection not relevant to hinder the taking of terms for production, reserving this matter after production: but their judgment is reversed.

The defenders made another objection, that the pursuer claimed under a charter to heirs male, whereas a subsequent charter, as they offered to prove, had been granted to heirs general. The Court gave the same judgment on this objection as on the former, but their judgment is also reversed:

And it is ordered, that in the further progress of the cause the Court do not oblige the appellants to take a term for production until the pursuer make out his title upon which he founds his suit.

*Seque.*—The Court having repelled an objection made to a *libine* written *in caskways*; that the witnesses had only signed the last page; the judgment is reversed.

**I**N 1722 the respondent brought an action against the appellants, before the Court of Session, of reduction improbation, and declarator of the titles by which the appellants held certain lands, the fee of which the respondent claimed as vested in him. In this action the respondent stated, that in 1625, upon the resignation of Mary Countess of Buchan, and James Areskine, son of John Earl of Mar, her husband, a charter from the crown was granted to them of the estate of the family of Buchan, in life-rent, and to James Lord Auchterhouse, their son, and the heirs male of his body, whom failing to the heirs male of their marriage, whom failing to the heirs male of the said James Areskine the husband:

That James Lord Auchterhouse, then Earl of Buchan, when he succeeded to the estate, charged the same with several wadsets, granted divers trust-rights, and having contracted debts, his creditors obtained apprisings of great part of his estate for small and inconsiderable sums: and that the creditors, and others, having or pretending to have rights upon the said estate, entered into possession of a great part of it, and taking advantage of the difficulties in which the family was involved, continued in possession, though their debts were considerably overpaid by receipt of the rents and profits:

That this James Earl of Buchan died in 1664, and none of the heirs of the family made up titles to the estate, till it had devolved upon the respondent, and after the act 1595, c. 24. had been passed, allowing heirs to enter *cum beneficio inventarii*, but that the respondent having been beyond seas when the succession devolved

devolved upon him, and the *annus deliberandi* having expired before his return, he in 1705 applied for and obtained an act of parliament, allowing him to serve himself heir male *cum beneficio inventarii* to his predecessor last infeft: and thereupon he was, on the 27th of August 1706, duly served heir male to the said James Lord Auchterhouse, afterwards Earl of Buchan, who died in 1664, *cum beneficio inventarii*; and that in virtue of this service the respondent took infeftment at the Castle of Banff, by virtue of a dispensation contained in the said charter 1625, of all the lands contained in that charter: and, in support of his action, the respondent produced the retour of his service, and the instrument of sasine taken thereafter in his favour.

The appellants at first contended, in this action, that the title produced by the respondent was not sufficient to entitle him to maintain the action, but that he should also produce the said charter 1625, under which he claimed, together with the act of parliament allowing him to serve heir *cum beneficio inventarii*. The Lord Ordinary, on the 8th of January 1724, "Repelled the objection and sustained the respondent's title:" and to this interlocutor his lordship adhered on the 28th of January and 4th of February following. The appellants having, however, obtained a stay of proceedings, on the 23d of June 1724, they were ordered to proceed in the cause.

They now brought forward two objections to the instrument of sasine, that the witnesses had only signed the last page, and that it was therefore void: and that it was also void, having been taken at the Castle of Banff, which was no part of the earldom of Buchan, nor of the lands claimed by the respondent; for though the castle in 1625 was part of the earldom, and sasine taken at the castle was then sufficient, yet it had been conveyed by Earl James (under whom the respondent claimed) to one Sharp, who in 1662 had procured a crown charter of the Castle of Banff and certain lands to him and his heirs, and who had ever since been in possession of the premises: they objected further that the respondent could have no title under the said charter 1625, by which, he stated, the estate had been limited to the heirs male of James Earl of Buchan, formerly James Lord Auchterhouse; for that by this charter a power was reserved to James Arskine, the father of Lord Auchterhouse, to sell all or any part of the said estate; and he, in 1636, conveyed all his estate to trustees for payment of debts, upon which they were duly infeft: and that after this James the father's death, the trustees entered into a contract with James then Earl of Buchan, formerly Lord Auchterhouse, for a reconveyance of the estate; and accordingly upon the marriage of this Earl James, a procuratory of resignation was executed by the trustees with his consent, upon which a crown charter was obtained in 1652, settling the said lands and estate to the said James Earl of Buchan, and the heirs male of his then marriage, whom failing to the heirs male of his body of any other marriage, whom failing to the heirs female of his body, upon which charter sasine was duly taken and recorded; of which sasine the

the appellants produced a copy: and that this Earl James sold various parts of the estate, and the appellants possessed under titles which had not been challenged for 70 years, some parts of the lands having in that period been sold five or six times over.

The respondent made answers upon these points, and the Lord Ordinary, on the 28th of November 1724, " Found the  
" objection against the respondent's title, that though sasine is  
" taken at the Castle of Banff, by virtue of a dispensation in his  
" predecessor's charter, yet by a charter of a posterior date, and  
" before his taking of the sasine, the said Castle of Banff was dis-  
" joined from the barony, not competent in this state of the  
" process to hinder the taking of terms, reserving to the appel-  
" lants to be heard thereupon after the production is satisfied;  
" and repelled the objection that by a charter posterior to that  
" whereby the estate stands provided to heirs male, the destina-  
" tion of succession was altered to heirs female, reserving to the  
" appellants to be heard thereupon after production, in case it  
" shall then appear, that their rights flow from these heirs female;  
" and repelled the objection formerly taken to *avisandum* that  
" each page of the sasine is not signed by the witnesses but only  
" the last." The appellants having reclaimed, the Court, on the  
5th and 15th of January 1725, adhered to the said interlocutor of  
the Lord Ordinary, and assigned a term for production.

The appeal was brought from " several interlocutory sentences  
" of the Lords of Session of the 8th and 28th of January, and  
" 4th of February, the 23d of June and 28th of November 1724,  
" and the 5th and 15th of January thereafter." Entered,  
28 Jan.  
1725.

#### *Heads of the Appellant's Argument.*

When objections were made to the respondent's title, a suppo-  
sition that such title might be good was not a sufficient reason to  
decree the appellants to produce the several titles under which  
they claimed: it would, in their opinion, have been much more  
just, to have considered the objections made to the respondent's  
title in the first place; for if upon these points judgment were  
given for the appellants, there would be an end of this suit. To  
what purpose would it be for the appellants to enter into an ex-  
pensive suit, and produce their title deeds, when it plainly appears  
from the charter 1652, which the appellants insisted upon, that  
the respondent, the pursuer in the Court below, has no title at  
all? That question ought therefore to have been determined  
first.

The Court of Session were so far of opinion, that the objec-  
tions to the respondent's title were of weight, that they have re-  
served to the appellants the benefit of being heard upon them  
after the production is satisfied; but the appellants conceive that  
since the respondent is attempting, as heir *cum beneficio inventarii*,  
upon a charter granted 100 years since, to disturb the possession  
of purchasers for full and valuable considerations, and who have  
been in quiet possession for 70 years, great care ought to have been  
taken, that the title under which the respondent claims should be  
produced,

produced, and appear clear and subject to no exception before purchasers should be obliged to produce their title deeds.

The argument against the respondent's *saline* is a plain bar to the action, and puts an end to the cause: when that matter was fully laid before the Court, it ought to have been determined before any further proceedings were had, because, if well founded, it overturned the respondent's title.

If the estate in question be limited to the heirs general of Earl James, under whom the respondent claims, which the appellants offered to prove, the respondent has no interest, as he claims in the character of heir male. The right under which the respondent claims was cut off by the limitation to the heirs general contained in the charter 1652, none of whom are parties to this action. After the present action is disposed of, the appellants may be sued in another action by the heirs general; whereas all those inconveniences would have been obviated had the judges obliged the respondent to make out his title in the first place.

An action of a similar kind with the present was brought by the Earl of Caithness against the Earl of Breadalbane and others, in which the defenders made several objections to the then pursuer's title: the judges, without determining those points, directed the defenders to produce their title deeds, reserving to them, as in this case, the benefit of their objections after production: but upon appeal, this House "reversed the interlocutors complained of, and ordered that the Lords of Session, upon the further progress of the cause, should not oblige the appellants to take a further term for production, until the respondent should have made out his title, upon which he founded his suit."

30 March  
1783-4.

#### *Heads of the Respondent's Argument.*

Though the act of parliament, allowing *salines* to be written bookways, founded on by the appellants, contains the proviso that the witnesses should sign every page; yet by a posterior act 1696, c. 15., it is enacted, that where any security or title deed is written bookways, it shall be signed by the witnesses on the last page only; and the respondent's *saline* being a security, and signed according to the directions of the latter statute, the notary having signed each page, and the witnesses the last, in the same manner that almost all the *salines* posterior to the said statute are signed, the objection was without any foundation.

It is the known right and prerogative of the crown to appoint one particular place for taking *saline* in lands, however discontinuous; and the Castle of Benff having been appointed the place at which *saline* for the whole earldom of Buchan was to be taken, the proprietor's aliening, and the crown's of course granting the said lands to another person without declaring the union to be dissolved, did not defeat the effect of the prior appointment; and the respondent could not be seised in any other manner upon his return to James Earl of Buchan, than agreeable to the directions of the crown

crown in his investiture, and which investiture upon record did notify to all parties interested that such sasine was sufficient and perfect. Besides, this pretended alienation of the Castle of Banff is one of the deeds which the respondent is to reduce and declare void by this action; and, consequently, in making up his title he was to pay no regard to it.

No such charter, as was suggested by the appellants, altering the settlement made in the year 1625, appeared, or was so much as pretended to be extant in the records: their allegation, therefore, of such charter could not be regarded, as being without any manner of proof. The copy of the sasine which the appellants gave in evidence afforded no proof at all, for it was no more than a copy; and though the principal sasine itself had been produced, yet it being no more than the assertion of a notary, without the charter, its foundation and warrant, it could signify nothing. If the appellants imagined they could produce such charter, or any other writing which could serve for their defence, the respondent was willing to agree that a term should be assigned them for that purpose, yet so as they should have the same term assigned for production of their rights called for. Besides, though such deed had been produced under which the heirs general might have claimed, as after the strictest search into the records none did appear; yet these heirs general being no parties to this action, having at no time claimed this estate, nor made any conveyances to the appellants, the appellants could not found any plea on such charter, nor force the respondent to debate the validity or import of it; because, should the respondent prevail, he might be again sued at the instance of these heirs general, so that he could have no advantage of a judgment in the present question.

The respondent conceives it is improper to take any notice here of the pretended long possession of the appellants, in consequence of their title deeds, if they any have, no evidence having been brought of such possession, or so much as offered or founded on in the Court below. Besides, length of possession upon redeemable rights can never bar the right of reversion, nor can it appear whether the rights of the appellants are subject to a right of reversion or are irredeemable, but by a discovery of their title deeds, which is the scope of the present action.

The case of the Earl of Caithness against the Earl of Breadalbane is no ways the same with the present. The Earl of Breadalbane and other appellants there pleaded, that the right under which the Earl of Caithness the respondent claimed, which was no more than an ancient apprising for a pretended debt of very small value, was prescribed, no possession having been had of any of the lands therein contained in 40 years after the date of it, and consequently that it was utterly void. That the 40 years were elapsed, appeared upon the face of Lord Caithness's title, and the only answer given was, that he said he could prove that several steps had been taken to interrupt that prescription. Whereas in the present case, the respondent, as heir male, being legally vested in this estate by the retour and sasine in his favour, the

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allegation,

allegation, without any present proof offered to the Court below, that by a subsequent charter the estate stood limited to the heirs general of James Earl of Buchan, did require a term for proving, and consequently could not afford a pretence to the appellants to avoid taking a term for production of their title deeds.

The interlocutors appealed from are so plainly founded on the uniform practice of the Court below in the like cases, that the whole judges were unanimous in them, which never happens but in the clearest cases.

Judgment,  
15 April  
1725.

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences complained of in the appeal be reversed: And it is further ordered, that the Lords of Session in the further progress of this cause, do not oblige the appellants to take a term for production, until the respondent, the pursuer below, have made out his title upon which he founds his suit.*

For Appellants, C. Wearg. C. Talbot. Will. Hamilton.  
For Respondent, P. Yorke. Dun. Forbes. Ch. Arskine.

On the point of the union, the interlocutor of the Court of Session here reversed, is stated as an existing precedent in the Dictionary, Vol. II. p. 496.

With regard to the witnesses signing only the first page of the sasine Lord Bankton B. 2. Tit. 3. § 40. rightly states that the judgment of the Court was reversed: Erskine on the contrary, B. 3. Tit. 2. § 16. mentions this as an existing decision.



John Earl of Sutherland, and Captain David  
Ross, of Daan, Tenant of the Lands of  
Skelbo

*Appellants ;*

Mr. Archibald Dunbar, and Sir Thomas  
Calder, and others, Creditors on the Estate  
of Skelbo

*Respondents.*

19th April, 1725.

*Temporary Jurisdiction in the Commissioners of Forfeitures.*—Claims upon the estate of an attainted person, which had reverted to a loyal superior, did not fall under this jurisdiction, but remained to the Ordinary Courts.

*Process.—Adjudication.—Mails and Duties.*—In an action of Mails and Duties brought by an adjudger, the superior to whom the estate had reverted makes various objections to the adjudications, as already paid, and as irregular; upon the adjudger finding caution to repeat over-payments, these objections are repelled, leaving to the superior his remedy by declarator.

*Sequestration.*—An estate of a person attainted, which had reverted to a loyal superior, is sequestered at the instance of competing creditors, adjudgers prior to the forfeiture.

**I**N 1721, the respondent Dunbar brought an action of mails and duties before the Court of Session, in right of certain decrees of adjudication in his person, against the tenants of the lands of Skelbo, which had belonged to the Lord Duffus, but upon his forfeiture for high treason, had reverted to the appellant the earl as superior, in terms of the act 1 G. 1. c. 20. and 5 George 1. c. 20.

In this action of mails and duties, the appellant the earl appeared for his interest. After the commencement thereof in April 1722, he granted to the other appellant Captain David Ross, a tack of the said lands of Skelbo, for 19 years from Whitsunday 1722.

The earl at first contended, that he was entitled to the lands of Skelbo, and rents thereof, in preference to the respondent Dunbar, but the latter insisting, that by the acts 1 G. 1. c. 20., and 5 Geo. 1. c. 20. the estate was given to the superior subject to the vassals debts, the Lord Ordinary on the 22d of December 1721, “preferred the respondent to the appellant the earl.” The appellant objected to this interlocutor on the head of his privilege of parliament; but when his privilege took no place, the Lord Ordinary on the 3d and 7th of July 1722, adhered to his former interlocutor.

Against these interlocutors the appellant the earl reclaimed to the whole Court, stating that the lands falling to him as superior were only liable to a proportional part of the debts adjudged; and Lord Duffus having had other lands they should bear a proportion of the debt. The respondent Dunbar made answer, contending that he as creditor had a right to affect what estate he pleased with his debt, without prejudice to those claiming the right of property, ascertaining the proportion of the debts among them-

selves. On the 21st of July 1722, the Court "refused the desire of the petition." The earl presented another reclaiming petition, and, after answers, the Court on the 25th of July 1722, "refused the desire of the petition, reserving to the Earl of Sutherland to insist in any proper action for extinguishing the adjudications as accords, and allowed the decree to be extracted, the respondent in terms of a concession made by him finding caution to repay in case any part of the sums in the adjudication which he insisted on as owing, should be made appear to be satisfied and paid." The appellant the earl again petitioned the Court, insisting that the adjudications were not regular, and praying to be heard upon the nullities objected to them: but the Court on the 27th of July 1722, "adhered to their former interlocutor, reserving likewise to the earl to insist in any proper action for reducing the respondents' titles on the grounds mentioned in the petition or any others."

A commission having been granted to the tenants, to depose as to their rents, on the 5th and 26th of December, 1722, the term was circumduced against them, and they were held as confessed on certain rents condescended on. Other persons having then applied as creditors on the estate, to be made parties, on the 21st of February 1723, the Court appointed the estate to be sequestered and remitted to the Lord Ordinary to appoint a factor to levy the rents: and pursuant to this remit the Lord Ordinary on the 8th of March thereafter appointed Sir Thomas Calder factor accordingly.

The tenants suspended the decrees obtained against them, but on the 20th of November, and fourth of December 1723, interlocutors were pronounced against them by the Lord Ordinary, and, on the 12th of December thereafter, by the Court.

Upon the application of the competing creditors praying that Sir Thomas Calder might be continued factor, till the event of the process of ranking was ascertained, the Court on the 6th of June 1724, "continued the sequestration of the said estates and appointed the said Sir Thomas Calder factor thereon, until their Lordships should think fit to recal the same, he giving sufficient security." The appellant Ross now, for the first time appeared in the action, and gave in a petition, insisting upon his lease of the premises from the Earl of Sutherland; and stating that the Court of Session had no right to determine the claims upon this estate, which came under the jurisdiction of the commissioners of forfeitures: after answers for the respondents, the Court on the 7th of July 1724, "refused the desire of the petition."

The appeal was brought from "several interlocutory sentences or decrees of the Lords of Session of the 22d of December 1721; the 3d, 7th, 21st, 25th, and 27th of July; the 5th and 26th of December 1722; the 21st of February, 8th of March, 20th of November; 4th and 12th of December 1723; the 6th of June and 7th of July 1724."

Entered,  
26 Nov.  
1724.

*Heads of the Appellants' Argument.*

The Court of Session had no jurisdiction to determine of Mr. Dunbar's claim upon a forfeited estate, the power of determining such claims being by act of the 4th of his present majesty's reign c. 8. vested in trustees exclusive of all Ordinary Courts. And as superiors are by the act 5 Geo. 1. c. 20. obliged to pay a proportion of the forfeiting persons' debts, answerable to the estate returning to them; so this proportion ought to have been determined by decree of the said trustees.

By the proceedings had in the present case, the whole debt claimed by the respondent Dunbar, is made a burden upon that part of the estate of the forfeiting person which fell to the earl as superior, though the earl was able and offered to have proved to the Court, that the attainted person had another estate forfeited for the use of the publick, which therefore ought to have been liable to a proportion of the respondent's claim. The earl further offered to prove to the Court that the respondent Dunbar had possessed the estate of the late Lord Duffus, lying in the county of Moray, amounting to 400*l.* yearly, by which possession his claim was extinguished.

The respondent contended that these objections were not available in that state of the process, and were reserved by the interlocutors of the 25th and 27th of July 1722: but the case of the possessor is always favourable, and a good plea for recovering possession, must by the principles of law be of greater force to retain it when recovered. And by the law of Scotland, whatever is a legal ground for setting aside a deed, in an action of reduction, is always held a proper defence for a possessor, when insisted against in an action to eject him. The reservation, therefore, in favour of the earl does in effect admit the justice of his cause, and the iniquity of the decree.

*Heads of the Respondents' Argument.*

The objection to the jurisdiction of the Court of Session was never started, till after the power of the trustees for determining claims was expired. But the trustees for forfeitures had no power of determining claims upon this estate, because it was not vested in them for the use of the publick; in consequence of the act of the 1 Geo. 1. c. 20., it had devolved on the appellant, the Earl of Sutherland, subject to the demands of creditors. The appellant himself claimed this estate not before the trustees, but the Lords of Session, and the same was then decreed to him subject to the debts.

The appellant the earl offered to prove that the forfeiting person had a separate estate, upon which a proportion of the debts ought to have been charged; though this allegation in general might seem to merit regard so far as to be admitted to proof, yet when the appellant was desired to mention any one parcel of estate that belonged to the forfeiting person, he could not particularize any, the Court therefore justly looked upon the allegation as groundless, and made of design to gain time.

The earl also offered to prove that the adjudications of the respondent Dunbar, were satisfied and extinguished by payment, and made several objections to the regulation of the securities. As this seemed only a pretence to retain possession, the Court justly refused a commission to make proof of such general allegations, but reserved an opportunity to the appellant if he thought fit to bring a proper action for that purpose, and the respondent gave security to be answerable for whatever should appear to have been over paid.

The appellant Ross who had a tack from the appellant the earl stated that he was turned out of possession without being made a party to the action. But the tack in question is dated in April 1722, more than a year after this action commenced, and several months after the first judgment pronounced in favour of the respondent; and as he, therefore, could not be originally made a party, so there was no occasion for making him a party afterwards, the question being as to the right of the lessor, and that being determined against him, his lease made after the suit commenced was of no consequence.

Judgment,  
19 April  
1725.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutory sentences and decrees therein complained of be affirmed.*

For Appellants, C. Wearg. Ch. Arskine,  
For Respondents, Dun. Forbes. G. Talbot. Will. Hamilton.

Case 123. Volrath Tham, Merchant in Gottenburgh *Appellant;*  
*Edgar, 23* Charles Sheriff, and Richard Sheriff *Respondents.*  
*Dec. 1724.*

23d April 1725,

*Facts.*—A foreign factor advises his correspondents, that he has disposed of a cargo, and shipped returns for it, on both which he charges commission; he afterwards brings an action against the correspondents, alleging that he had sent his own goods, and had not received proceeds for theirs; but he is not allowed to prove facts contrary to his correspondence.

The knowledge of the ship-master, though Supercargo, and part owner, not relevant against the correspondence.

*Proof.*—The factor having refused to allow a proof of the ship-master's knowledge by his own oath, a proof by witnesses is refused him.

IN the year 1717, the merchants who sent goods to Sweden, suffered great losses, by an ordinance of the then king, by which a small piece of coined copper, of the size of a farthing, called a *Minttoken*, was made current for the value of a dollar Swedish: having been paid in this specie, the homeward cargoes could not be purchased but at a great discount.

In 1718, the respondents and several others, who had purchased, on their own separate accounts, parcels of herrings, loaded them  
had

for the Baltick, on board a ship of which James Sheriff, brother of the respondents was master; each adventurer having taken a separate bill of lading for his own parcel, marked with his own mark, and each being to stand the risk of his own adventure. A commission in writing, signed by the adventurers, dated the 1st of September 1718, was given to James Sheriff the master, by which he was empowered to call at Gottenburgh, in his outward voyage, and to sell and dispose of the cargo of herrings if the market was good, and if iron and deals were to be got for the proceeds; but if these were not to be got for net proceeds, he was prohibited at any rate to sell, but to take advice from Stockholm, how markets ruled there; and in case they did not answer he was to proceed to Dantzick, and there to sell and reload an inward cargo.

About the middle of September 1718, James Sheriff arrived with his vessel at Gottenburgh, and immediately applied to the appellant for his assistance in disposing of his cargo, and delivered to the appellant a letter from the respondent Richard, in which were these words: "my brother James is now loaded with herrings; you'll be assistant in disposing of all to the best advantage; and what further I have to say, I refer you to my brother who has orders to manage my affairs."

The appellant having undertaken the management of this business, on the 19th of September 1718, advised the respondent Richard of his having made application to the Swedish ministers, Count Morner, and Baron Gortz, to have a bargain made with his Swedish Majesty, for iron in exchange for herrings: and by a letter on the 20th of October, to the respondent Richard, the appellant wrote as follows: "concerning Mr. James Sheriff's loading, have I sold to His Majesty, to wit, every barrel of herrings, accounted to 20 dollars, and every ship pound of iron free on board to sixteen, and shall in fourteen days time, or thereabouts, be ready to go from hence. I can assure you that I have had incomparable much trouble to get so far, because iron is incomparably scarce, and so much disposed of, and much more as can come down this year." On the 17th of November the appellant again wrote to the respondent Richard, in these words: "now goes by your brother Captain James Sheriff, who hath had iron for the proceeds of his herrings, and 195 barrels pitch, and 5 barrels tar in discount of the old account: I can assure you, that he is so well expedite, as these times ever can be possible. I send you sale accounts of the herrings, amounting to 7004 dollars, and the invoice upon the iron amounting to 8215 dollars, which you will please after finding right to note conform with me."

On the 20th of November, James Sheriff, the master, wrote to his brother Charles as follows: "when I came first to the river, I anchored at the new castle, and immediately wrote to Stockholm, to know how the price of iron and herrings ruled there; after shewing Volrath Tham my commission, and he finding me positively resolved not to sell at any rate, except I got iron

"and deals for value of herrings, we at last concluded a bargain.  
 "and I have received for my loading iron and deals, as per bill  
 "of loading inclosed, which I have sent for the behoof of the  
 "concerned, in which my share, as part freighter, is also in-  
 "cluded."

After James Sheriff was thus loaded, and ready to sail, he was detained for some time by the frosts, and after the death of the then King of Sweden, on the 30th of November 1718, an embargo was laid upon all shipping in the river. On the 3d of January 1719, the appellant wrote another letter to the respondent Charles, advising of this event.

James Sheriff arrived in Scotland in February 1719, and by him the respondents received the account sales of the herrings, and the invoice of the iron and deals, as the proceeds of the outward cargo. By this account sales and receipt thereon, the appellant acknowledged receipt of the herrings making up 667½ barrels at the prices there stated, amounting to a certain sum, and charges, *inter alia*, 2 per cent., for his commission, mentioning that the same were sold for account of the respondent Richard; and by the invoice, the appellant acknowledges that 75 dozen of deals, and 475 ship pounds of iron were likewise bought for account of the said Richard Sheriff, and he charges 2 per cent. commission for buying the same, the deals and 400 ship pounds of the iron being sent for proceeds of the herrings, and 75 ship pounds of iron in payment of a former balance. And upon the footing of these vouchers and the letters of correspondence, the several freighters, cleared accounts with James Sheriff the master, paid him his freight, and divided the home-ward cargo.

Afterwards in December 1719, the respondent Richard received a letter from the appellant, informing him that 442 barrels of the herrings had been sold by him to the king of Sweden, with the knowledge and advice of James Sheriff the master, for iron, which was not delivered, not being come down from the mines; and as a favour to James Sheriff, who had lain a considerable time at the port, he had taken the liberty to ship on board his vessel 280 ship pounds of iron, purchased in return of herrings sent by Messieurs Hogs, on board a ship of which James Young was master, from one Klaas Habecht: that upon the King of Sweden's death, a stop was put to the delivery of iron on the king's contract, and the appellant was obliged to purchase iron at a much greater price, to put it on board the said James Young's ship, on account of Messieurs Hogs; and that the iron due for the respondents herrings was still a debt upon the Crown of Sweden: and the appellant inclosed an account current, charging the respondents with the difference of price between the 280 ship pounds of iron, at the former price of 38 copper dollars, and the new price at 54 copper dollars per ship pound; for which he also drew bills upon them.

Upon

Upon their refusal to pay he brought an action against them before the Court of Session, for the price of the said 286 ship pounds of iron, and likewise for the price of 58 pounds more, at the rate of 54 dollars per ship pound, and the appellant craved that the Court would allow him to prove the matters and facts alleged by him. After defences for the respondents, the Court on the 25th of July 1724, "found that the appellant having advised by his letter of the date the 17th of November 1718, that iron was loaded for the proceeds of the herrings, conform to James Sheriff's commission as super-cargo, and his letter of the 20th of November aforesaid, the appellant could not now be allowed to prove contradictory facts to his former correspondence; and found the allegiance that James Sheriff's knowledge, (the party concerned in the outward voyage) that part of the appellant's iron and Young's was on ship-board in return for the outward cargo, was not relevant against the respondents, and found no presumption that James Sheriff did advise the freightors of the true fact."

The appellant reclaimed, insisting, that James Sheriff *the brother, trustee, and super-cargo was privy to the real transaction and ought to have informed the others of it*: and therefore the appellant again prayed to have a proof of his allegations: to this petition the respondents put in answer, and the Court on the 26th of December 1724, "adhered to that part of the former interlocutor, of the 25th of July last, finding that the appellant having advised by his letter of the 17th of November 1718, that iron was loaded for the proceeds of the herrings conform to James Sheriff's commission as super-cargo by the freightors, and his letter of the 20th of November aforesaid, the appellant could not now be allowed to prove contradictory facts to his former correspondence; and in regard the appellant did not offer to prove James Sheriff's knowledge of the facts founded on by his oath, refused to allow any proof thereof by witnesses."

The appeal was brought from "two interlocutors of the Lords of Session made the 25th of July, and 26th of December 1724." Entered,  
14 Jan.  
1724-5.

#### *Heads of the Appellant's Argument.*

If the facts insisted upon by the appellant should be made out upon proof, it is extremely reasonable that he should have relief. It were very hard, if a merchant or factor, out of favour or friendship to his correspondents, load his own goods aboard their ship, before the goods that properly belong to them come to hand, in order that the ship may sail more speedily, and omits to give notice that the goods so shipped were his, and not theirs; but in general informs them, that they have such goods on board for the proceeds of their outward cargo; and afterwards upon discovering his correspondent's goods are lost or incumbered, should not be able to repair his mistake, and upon proof of the fact recover the value of his goods; for the *bona fides* that prevails in

in all mercantile dealings, forbids that advantage should be taken of casual mistakes or omissions for which probable causes may be assigned, and common justice will not allow that one man should profit by this innocent mistake of another.

The correspondence itself does not so fully express this matter, as to deprive the appellant of a liberty of making proof of these facts. Nothing therefore could be more reasonable than to allow the appellant to make proof of these facts, especially when he charged that they might have had notice of the real fact by James Sheriff who was privy thereto.

The appellant had no reason to prove James Sheriff's knowledge of these facts by his own oath, because that would, by the law of Scotland, have been conclusive against him, and he could not have been at liberty to falsify that oath. It was therefore just, that the appellant should be at liberty to prove that fact, as well as the others, and in the same manner.

#### *Heads of the Respondents' Argument.*

To prevent a prejudice, which one of the respondents had formerly suffered, a limited commission was given to James Sheriff, and accepted of by him, wherein he was expressly required not to sell the herrings except he could load iron and deals for the net proceeds: James Sheriff shewed this commission to the appellant, and both of them acted in pursuance of it, as appeared by the appellant's and James Sheriff's letters; therefore the appellant could not be allowed to prove facts, at such an interval of time, inconsistent with his own accounts and advices sent to the respondents.

If correspondents are allowed to vary in their advices of facts admitted to consist with their knowledge, commerce would become impracticable, neither could accounts be ever concluded; and the appellant, when he pretended to rectify a mistake in the correspondence by his letter of the 10th of July 1719, and 3d. of February 1720, claimed only the difference money to conclude all accounts; whereas, as if he had fallen into a second mistake, in his action he insisted further, for the value of 338 ship pounds of iron, a plain evidence of what dangerous consequence to trade it must be to allow correspondents to vary in point of fact.

As to the pretence, that this transaction consisted with the knowledge of James Sheriff, the respondents contend, that though he was part freighter, as well as master of the ship, yet the adventurers having severally purchased their parcels of herrings, taken separate bills of lading each for his own particular parcel, marked with his own mark, and James Sheriff having but a commission expressly limited, and shewn to the appellant, his knowledge, or even consent, could not found an action against the respondents.

Though the appellant could possibly bring parole evidence to disprove the matters affirmed by him in his correspondence so long after the negotiation was finished, and the respondents had



had cleared with one another, and the other parties concerned, he ought to have no advantage from it; and, further the circumstances of the case, and the vouchers founded on by the respondents must find greater credit, than any evidence that could arise from the oaths of persons whose characters are unknown, and who were not particularly acquainted with the whole facts in question.

If the appellant really sold such parcel of herrings to the royal deputation, it was upon his own risk, having acted only in pursuance of the limited commission given to James Sheriff, who neither lawfully could, nor did consent to the disposing of the herrings but upon the condition of being reloaded with iron and deals: he had 4 per cent. upon the whole cargo, for procuring the said iron in exchange for the herrings; and if the iron had really afterwards been delivered by the royal deputation, when the price advanced, the appellant neither would have accounted, nor could he have been compelled to pay the difference to the respondents of the advanced price upon the iron; so that the sale, if any such there was to the royal deputation, was at his own peril.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed.*

Judgment,  
23 April  
1725.

For Appellant, *Dun. Forbes. C. Talbot. Will. Hamilton.*  
For Respondents, *C. Wearg. C. Arskine.*

Sir Alexander Maxwell of Monreith, Bart. *Appellant;* Case 124.  
Andrew Houston, Esq. *Respondent.* Dalrymple,  
28 Jan.  
1715.

*Et c contra.*

30th April 1725.

*Variation.*—An objection to a deed that it was erased in *substantialibus* is repelled. *Faems Intromission and Giftis pro Herede.*—A person grants an entail of his estate to his son, and his heirs male whatsoever; with the burden of his debts; the son grants a back bond, in consideration of said entail to pay the father's debts: after the death of the father and son, the daughters convey the estate real and personal of their father to a creditor, without making up titles by inventory or confirmation; and the creditor grants bond to protect them against what they had done, and from the debts of their father; the heir male of entail having got back the estate sues the said creditor for debts of the father as a vicious intrometter, in which he obtains decree; and the Court also find the moveable debts due to such intrometter to be extinguished: but the judgment is reversed; and the creditor is ordered to account for actual intromissions only.

**W**ILLIAM HOUSTON of Cultreoch on the 17th of January 1691, made a settlement and entail of his estate to himself in life-rent, and to William his son, and his heirs male whatsoever,

ever, with the burden of payment of the grantor's debts: and at the same time William the son executed a bond whereby he became personally bound to relieve his father of certain debts he had contracted before making the entail. William the father dying in February 1709, leaving his said son and four daughters; and the son dying in March thereafter without issue, the estate by said entail descended to the father of the respondent the brother of William Maxwell the elder; and the respondent's father in July 1709, was duly served heir of provision in the said estate, and after his death the respondent obtained a charter thereof, under the great seal upon which he was duly infeft.

The estate of Cultreoch being conveniently situated for the appellant's father, he had procured from William the father, and William the son a deed, dated 30th April, and 3d May 1708, whereby they became bound under a penalty of 2000*l.* Scots, to prefer Sir William Maxwell to any other purchaser in case they should sell these lands; and soon after the death of the two Williams, father and son, the appellant's father brought an action against the daughters, on the ground of the said deed, and of certain debts secured on the estate which he had purchased: two of the daughters who were married, and their husbands, and two who were single, disposed and conveyed to the appellant (his father being then dead,) the whole real and personal estate of their father and brother, for the consideration of a small sum: and the appellant granted them an obligation to indemnify the daughters and their husbands against all debts owing by the father and brother, and all actions that might be brought against them on that account; these deeds were dated in April and May 1709.

The appellant thereupon took possession of the charter chest of the family, and carried the same to his own house, having broken the seals put on it by the proper judge; and he also possessed himself of the whole estate real and personal; and having possessed the personal estate for several months without confirmation, he afterwards to guard himself against any bad consequences therefrom, procured himself to be confirmed executor, and got the confirmation to be antedated several months.

In the mean time the respondent having made up a title by service, charter and sasine, the appellant brought an action against him for payment of certain debts to which he had acquired right, and which were secured upon the estate; and the respondent thereupon commenced his counter action concluding that it should be declared, that the daughters as vitious intrumetters, and having behaved as heirs to their father, and Sir Alexander Maxwell, as representing them, were bound to pay all the father's debts; and that the debts in the person of Sir Alexander were thereby extinguished.

The appellant appeared, and stated in defence to this action, that there was a manifest erasure in the deed 1691, under which the respondent claimed, for which he insisted the deed was invalid; in the clause settling the estate upon William the father in life-

life-rent, and William the son *and his heirs male whatsoever* as it stood in the deed, after the words *heirs male*, there was a plain erasure of two or three words, and thereon was written the word *whatsoever*: The Court on the 20th of June 1711, “sustained the deed of settlement, and repelled the objection “founded on the alleged vitiation thereof.” And to this interlocutor they adhered on the 10th and 17th of July thereafter.

Appealed  
from by Sir  
Alexander.

Ditto ditto.

The respondent then insisted on the vitious intromission by the heirs general, whom the appellant was bound to indemnify; and the appellant having stated his defence, that he had obtained confirmation before commencement of the action against him, as sufficient to defend him from the effects of vitious intromission; the respondent answered that not only the confirmation was antedated, but that the appellant had intromitted with more than he had given up in the inventory. The Court on the 13th of December 1711, “sustained the appellant’s defence as relevant; “and allowed both the appellant and respondent a proof of the “several facts alleged by them:” and, after various proceedings, this interlocutor was adhered to on the 13th of February 1713.

Ditto ditto.

Ditto ditto.

The appellant now presented a petition to the Court praying that the sheriff depute, and justice of the peace who inspected the charter chest, when it was sealed up at the desire of the daughters upon the death of William the son might be examined as to what writings they saw; and also that the Court would allow a probation of William the father’s, and William the son’s circumstances at the times of their death; and that certain creditors, to whom the appellant alleged his father had paid their debts, by the directions of William the father, might be examined as to the reality of their debts, and the payments so made to them, by which it might appear how far the appellant was a just creditor for the sums claimed by him. The respondent in his answers acknowledged that some of the debts had been truly owing, but he insisted upon the ground of law, that the whole debts were extinguished by coming into the person of one who was obliged to pay them. The Court on the 25th of February 1713, “refused the desire of the petition as to proving Cultreoch’s circumstances, or taking the oaths of the petitioner’s cedents; “but allowed a conjunct probation to both parties for proving “what papers were in the charter chest.”

Ditto ditto.

The objection made to the confirmation by the respondent, was, that though signed in October 1710, it bore date the 13th of July 1709, being the date of the decree dative: the appellant offered to prove that such was the common practice of the Court which granted the confirmation; but the Court on the 29th of July 1713, “refused the desire of this petition.”

Ditto ditto.

Witnesses having been examined, the cause was heard, and the Court on the 9th of December 1714, “found that Sir Alexander Maxwell by his bond of relief to the heirs of line is in the same “situation as to the debts of Cultreoch, paid and transacted by him, “as the said heirs of line would have been, if they had paid and “had

Ditto ditto.

Appealed from by Sir Alexander.  
Ditto ditto.

" had transacted the said debts." and to this interlocutor the Court adhered on the 12th of January 1715. On the 21st of same month, the Court pronounced the following interlocutor: " having again considered the state of the process, and advised the same with the testimonies of the witnesses adduced, and writs produced for probation, with the debate, and petition given in by Sir Alexander Maxwell, and answers thereto by Andrew Houston, find the defence of extinction of heritable debts in the person of a vitious intrometter not relevant to be alleged by an heir male; but sustain the defence of extinction of moveable debts paid by a vitious intrometter: and find the qualifications of vitious intromission against Sir Alexander Maxwell, relevant and proved: and likewise find the qualifications of the passive title of Behaviour as heir, relevant and proved against the heirs of line: and find that Andrew Houston now the heir male, is not obliged to relieve the heirs of line, by the quality of the disposition granted by Cultreoch elder to his son and heirs male; and the bond granted by Cultreoch younger obliging him, his heirs, executors, and successors to relieve his father of all debts." And to different parts of this interlocutor the Court adhered on the 12th of July and 9th of November 1716.

Ditto ditto.

After a further hearing of the cause, however, the Court on the 12th of July 1717, " found that abstracting from the disposition by Cultreoch the elder to his son, and qualities thereof, there is no relief competent to the heirs of line, or to Sir Alexander Maxwell, as coming in their places against the heir male for any debts of Cultreoch's, paid by the said heirs of line, or by Sir Alexander himself: but having considered the disposition by Cultreoch elder to his son, and qualities thereof, found that the debts of Cultreoch elder, were burdens on the subject disposed by him to his son, and that Andrew Houston as heir male to the estate of Cultreoch, contained in the said disposition, in right and virtue of that disposition is obliged to relieve the said Sir Alexander and the heirs of line of all the said debts." To this interlocutor the Court adhered on the 20th of November and 12th of December 1717; and on the 10th of June 1718 they " ordained Sir Alexander to give in a condescendence of the debts due by William the father at the time he made the entail."

Appealed from by both.  
Ditto ditto.  
Appealed from by Sir Alexander.  
Ditto ditto

Afterwards on the 22d of January 1720, the Court " sustained the defence proponed for Andrew Houston, that Sir Alexander Maxwell had intrometted with the moveables which belonged to Cultreoch the elder, or to his son after their decease, relevant *in tantum* to extinguish the debts of the said Cultreoch, and his son in the person of Sir Alexander the intrometter to the extent and value of these moveables intrometted with; and also found that relief is not competent to Sir Alexander, against Andrew Houston, for any sums in new bonds granted after the date of the disposition by the said Cultreoch the elder to his son, though it were instructed that these new bonds

" were

" were both innovations of old bonds, dated before the said disposition, and coming in place of these old bonds."

The original appeal was brought from " several interlocutory sentences or decrees of the Lords of Session of the 20th of June, 10th and 17th of July, and 13th of December 1711, the 13th and 25th of February, and 29th of July 1713, the 9th of December 1714, the 12th and 21st of January 1715, the 12th of July and 9th of November 1716, the 12th of July, 29th of November and 12th of December 1717, the 10th of June 1718, and 22d of January 1720."

Entered,  
25 Nov.  
1724.

And the cross appeal from " part of the abovementioned interlocutor of the 12th of July 1717, and of an interlocutor of the 29th of November 1717."

Entered,  
3 March  
1724-5.

*On the Original Appeal.—Heads of the Appellant's Argument.*

The settlement, under which the respondent claims, is plainly crazed in the most material article, the very part on which the respondent's right depends. There might, and probably have been words in that space, which now stand obliterated, that would have defeated the respondent's claim; and the respondent produced no manner of evidence that the deed stood so crazed at the time it was executed, or at any other time during the grantor's life, though surely he must have been supposed capable of making such proof had the fact been true; and by the deed as it stands crazed, the estate, on failure of heirs male, must have devolved on the crown in prejudice of the grantor's own daughters, and the issue female of his son, a settlement which no man in his senses can be supposed capable of having made.

Supposing this deed valid notwithstanding the crazure, yet as it was dormant, and not published in the proper manner by registration, or infestment, all the debts contracted by the grantor during his life were as much a charge upon the estate by the undoubted law of Scotland, as those contracted before the date of the settlement; and the making any distinction by cutting off the one kind, and allowing the other, is erroneous.

As this deed was dormant, the heirs at law might lawfully enter on the estate; and the appellant's purchase was honest and fair, the first offer of the estate having been intended him by the deceased, the undoubted proprietor: in these circumstances the entry of the heirs, and the appellant's purchasing could be attended with no penalty.

The heirs at law by intrometting with their father's estate, did not subject themselves universally to their father's debts, if it be true that the estate with which they intrometted, did not descend to them by reason of the settlement under which the respondent claims, because, by the law of Scotland, *acting as heir* is inferred only from a person's meddling with an estate to which he has an undoubted title to succeed. And as the heirs at law, whom the appellant was bound to indemnify, were not liable for the debts, so neither could the appellant in consequence of his bond, because that bond and the obligation therein contained

became void, the moment the conveyance in consideration of which it was granted was set aside.

The appellant's intromission with the personal estate was innocent in virtue of a proper title, an assignment by the daughters, to whom the personal estate had formerly been assigned by their father; and they had also a legal title to it as nearest in kin; so that on the supposition that this personal estate is, in the first place, liable to answer the debts of the deceased, the appellant can be no further liable than to account for so much thereof as he received, in terms of the interlocutor 22d January 1720.

With regard to what the respondent founded upon the possession had by the appellant of the charter chest; the daughters, no other right appearing, had a title to the deeds; and they being assigned to the appellant he might warrantably take them into his possession. The argument of the respondent goes only to this, that it is possible the debts now claimed by the appellant might have been paid off by the deceased in his lifetime, and that the bonds might have been locked up amongst his writings, and might have been taken from thence by the appellant, who might again have procured fresh assignments from the original creditors in his own name. But this suggestion must have been totally destroyed by the evidence which the appellant offered, had he been permitted to bring it, viz. the oaths of the creditors, and of the writers of, and witnesses to the several assignments; most of these debts too were secured by heritable bonds, and if these had been paid off, the discharges must have been recorded within 60 days, so that the taking away such discharges could have been of no use.

#### *Heads of the Respondent's Argument.*

By the known laws of Scotland, the heirs of line, or heirs general, who seize upon the personal estate of their predecessor without making an inventory of it, or who conceal a part of the estate, and make up imperfect inventories, which is called *vitious intromission*, are bound to pay all the debts of their predecessor: and such heirs general as intermeddle with the charter chest, or writings, or any part of the real estate of their predecessor, which is called *behaving as heirs*, are bound to pay his whole debts real and personal, and to relieve the heir of entail of them. Nor can this burden upon the heirs general be restricted to the value of the estate they succeeded to, even though they entered with the usual solemnities, unless they have in a regular manner made up faithful inventories of the estate before intermeddling with it.

The erasure in the deed 1691, stated by the appellant, is no more than may commonly happen in every writing; nor is the deed vitiated in any substantial part of it. To shew how groundless the objection was, the respondent all along offered to allow any words to be supposed, that could be contained in that space, and were consistent with common sense, and the usual form of such writings: but none can be contrived that will give the appellant any advantage.

The

The appellant did indeed get himself confirmed executor, but the confirmation was antedated several months, to give a colour to his defence on that head: and though the inventories were made up several months after the appellant had intromitted with the personal estate, yet he concealed part of the goods he had actually seized; which, by the law of Scotland, does unquestionably render him liable for the whole personal debts.

With regard to the proof offered by the appellant by the oaths of creditors, the respondent acknowledged that some of the debts were truly owing; but he contended that others were simulate, or had been paid and the bonds retired; and to examine persons upon oath to establish debts due to themselves would have been inconsistent. But the respondent rested upon this unquestionable ground of law, that the debts, whether true or not, were extinguished by coming into the person of the appellant, who was obliged to pay them.

*Heads of the Appellant's Argument—On the Cross Appeal.*

Though the personal bond of William the son be mentioned and recited in the deed of entail; yet it is by no means made a condition of the entail, nor inserted in the procuratory of resignation, or precept of sasine, without which, by the law of Scotland, it can never be a real burden on the estate.

By this personal bond William the son obliges himself, his heirs, executors, and successors, to pay the debts of his father, and by the known law of Scotland, the heirs general are in the first place obliged to perform this bond, and to relieve the heir male of it; which was known and understood by William the father when he accepted of the bond.

Even upon the footing of William the son's personal bond being a real burden on the estate, yet where William the father obtained a discharge of any debt due to him at the time of making the entail, that debt could be no longer a burden on the entailed estate, but must be considered as extinguished, and cannot afford a pretext for subjecting the heir of entail to new debts contracted after the date of the deed of settlement: and at all events such part of the estate as Sir Alexander intromitted with, should be applied towards payment of the debts of William the elder.

*Heads of the Respondent's Argument.*

The deed of settlement under which the appellant claims is made subject to the payment of the grantor's debts, and there seems to be no reason for the appellant to claim that estate, without performing the conditions of the deed under which he claims; that is, paying off the debts before that time owing by the grantor: and in equity he ought to relieve the heirs at law, and the respondent as claiming under them, of all the debts, both before and after the date of the conveyance, the estate being truly subject to them.

Judgment,  
30 April  
1725.

After hearing counsel on both sides, and due consideration had of what was offered by them in these causes, *It is ordered and adjudged, that the interlocutory sentences or decrees of the 20th of June, 10th of July, and 17th of July 1711, be affirmed; and that all the other subsequent interlocutors complained of by the appellant Sir Alexander Maxwell be reversed; and that the cross appeal of the respondent Andrew Houston, Esquire, be dismissed; and that in the further proceedings in this cause, the Lords of Session do allow to the appellant Sir Alexander Maxwell all such debts as he shall make out a right to, and that he be answerable to the respondent for so much of the personal estate, and of the rents and profits of the real estate as shall be made out that he hath received; and if it be proved that the appellant Sir Alexander Maxwell hath abstracted or taken away any particular papers out of the charter chest, the said Lords shall, for so doing, proceed against him as is just.*

For Sir Alexander Maxwell,	Dun. Forbes.	C. Talbot.
	Will Hamilton.	
For Andrew Houston,	C. Wearg.	Will. Fraser.

Part of the judgment, here reversed, is stated in the Dictionary as an existing decision, vol. 2. *Passive Title*, p. 44.

It is also so stated by Lord Bankton, b. 3. tit. 9. § 16. and by Erskine, b. 3. tit. 9. § 55.



John Neilson, of Chappell, Esq; - - *Appellant*; Case 125.

John Murray, of Conheath, Esq; - - *Respondent*. Edgar,  
22 Jan.  
1725.

16th Feb. 1725-6.

*Papist.*—*Jus tertii.*—An estate descends to two heirs portioners; the eldest a Papist, by her first marriage, has a son, a Protestant; in a contract on her second marriage she covenants to settle the estate on her husband and the heirs male of that marriage. After her second husband's death, the eldest son of that marriage, a Papist, grants a disposition of the estate to a third party: no titles had been hitherto made up by this son of the second marriage, nor by his mother; but the disponee now gave them a charge to enter heirs, and thereupon got adjudication. It was not *jus tertii* to the Protestant heir of the first marriage to object against this disposition.

Papists on whom the succession to heritable subjects devolved before the act 1700, were nevertheless precluded from serving heirs after that act passed without taking the formula.

An *onerous* purchaser from a Papist could not be in a better situation than the Papist himself.

A person *popishly educated*, who never took the formula, held to be a Papist.

An objection that a question was not moved of the disponee's Popery, and that he never was required to take the formula during his life, is repelled.

The act of parliament 3 G. 1. c. 18. did not extend to Papists in Scotland.

THE respondent, in 1718, brought an action before the Court of Session for reduction of several deeds, by virtue of which the appellant claimed the property of part of the lands of Conheath. The circumstances of the case, as stated by him, were,

That Alexander Maxwell, of Conheath, the respondent's grandfather, died in 1655, seised of the lands of Conheath, leaving two daughters, Elizabeth and Margaret, his heirs portioners; Elizabeth, the eldest daughter, was popish, and in 1671, intermarried with Gilbert Murray of Urr; and had issue the respondent, a Protestant, and James, a Papist:

That after Gilbert Murray's death, Elizabeth, his widow, in 1688, intermarried with Gilbert MacCartney, and by the marriage contract Elizabeth (though never served heir to her father, nor infeft in the said lands of Conheath) conveyed all right she had to her half of the estate to the said Gilbert MacCartney and herself, "in conjunct fee and life-rent, and the survivor of them, and the heirs of their bodies, begotten of the future marriage, which failing"—then followed a blank never filled up:

That the said Gilbert MacCartney died in 1695, leaving issue of that marriage, William, since deceased, a Papist, and Margaret still alive, and also a Papist: and the mother, designing to exclude the respondent, her eldest son, from the said estate, because of his being a Protestant, executed a deed, reciting her right of inheritance of the said estate, and thereby conveyed the same to her younger son of the first marriage, James, a Papist; and this James afterwards procured a disposition from William MacCartney, the son of the second marriage, who had not been served heir to his father, nor of that marriage, conveying all

right and interest, which he had to the said lands of Conheath, by virtue of the marriage-contract betwixt his father and mother, to one William Alves, a Protestant, but in trust for the said James Murray, a Papist: this disposition was dated in 1711; and Alves thereupon raised and executed letters of general and special charge against William MacCartney as heir of the said marriage, and against the said Elizabeth Maxwell as heir portioner to her father; an adjudication was obtained thereupon, and, on the 19th of May 1715, Elizabeth, the mother, ratified the said adjudication, and disposed to the said William Alves her right of life-rent, and all right and title she had or could claim to the said estate, without regarding her former disposition to James Murray, in order, so far as was in her power, to disinherit the respondent:

That the respondent was, in 1717, served Protestant heir to Alexander Maxwell his grandfather, as last seised in the said lands of Conheath; though his service was opposed by his mother, and by Robert Murray, son of the said James Murray then deceased, as well as by the appellant, who then stated his title to the estate on the ground of an agreement on the part of Alves to convey to him: and after the respondent's service, a disposition was granted by Alves to the appellant, on the 28th of December 1717 (a).

The respondent founded his action on the act of the parliament of Scotland 1695, c. 26. intituled, "Act discharging popish persons to prejudge their Protestant heirs in succession;" and on the act 1700, c. 3. intituled, "Act to prevent the growth of Popery," in so far as the incapacity of a Papist to succeed or convey to a gratuitous donee was involved in it. He contended, therefore, that the conveyance and title granted by William MacCartney to Alves, under which the appellant claimed, was void, William MacCartney being a Papist, and the same being in prejudice of the Protestant heir.

The appellant, at first, in defence, contended that it was *jus tertii* to the respondent to object against the conveyance in question, this being only competent to the Protestant heir of Gilbert MacCartney, the father of William; for that the respondent's mother divested herself of the fee of the estate in favour of her second husband MacCartney in 1688. The Court, on the 10th of July 1722, repelled the objection of *jus tertii* made by the appellant; and found that it was competent for the respondent to object against the disposition made by William MacCartney to Mr. Alves, or any other of the grounds of the adjudication.

The appellant next contended, that the estate descended to William MacCartney before the act 1700 was passed, and so was not comprehended under it. He stated, too, that he and Alves, his author, were *bona fide* purchasers from William MacCartney long be-

(a) Though not stated in the cases, it wou'd appear that Elizabeth, the respondent's mother, was dead when this action was commenced.

fore the respondent claimed any title as Protestant heir. After answers on this point, the Court, on the 14th of December 1722, " Found that by the act of parliament 1700, Papists at or after their age of 15 years, are disabled to succeed by serving themselves heirs in lands or other heritage after the date of that act, as well where the fee of the said lands, &c. had opened by the decease of the predecessor last infest, before the date of the said act of parliament, as where the predecessor survived that time; and found that the appellant, by being an onerous purchaser, could not be in a better case than MacCartney, the alleged Papist, from whom the appellant's right was by progress derived." And to this interlocutor the Court adhered on the 8th of February 1723.

The appellant afterwards craved and obtained a proof; and, after advising the same, the Court, upon the 14th of November 1724, " Found it proved that the said William MacCartney was Popishly educate, and found no evidence that he took the formula in terms of the act of parliament."

The appellant reclaimed, contending that it did not appear that William MacCartney had been educated in the Popish religion in terms of the act 1700; that the question could not be stirred after his death; and that the appellant's title was saved by the act 3 G. 1. c. 18. in favour of Protestant purchasers. After answers for the respondent, the Court, on the 4th of December 1724, " Adhered to their former interlocutor, reserving the consideration of the other parts of the bill." And upon the 23d day of January 1725, they " repelled the objection, that a question was not moved of MacCartney's being a Papist, and not having taken the formula during his life; and repelled the objection upon the act of parliament 3 G. 1. in favour of Protestant purchasers."

The appeal was brought from " several interlocutors or decrees of the Lords of Session of the 10th of July and 14th of December 1722, the 8th of February 1723, the 14th of November and 4th of December 1724, and 23d of January 1725." Entered,  
6 Feb.  
1724-5.

*Heads of the Appellant's Argument.*

The full and absolute property of the said estate was vested in the said Elizabeth Maxwell at the time of her contract of marriage with the said Gilbert MacCartney; and she having by the contract, no less than 36 years ago, conveyed the same for a valuable consideration to and in favour of the said Gilbert MacCartney, and the heirs of the marriage, the fee of the said estate devolved absolutely upon the said William MacCartney after his father's death, long before the act of parliament 1700. He conveyed the fee which was in him, and his mother conveyed her life-rent, and all other interest and title she was possessed of, to Alves, the appellant's author, for a full and valuable consideration: and a legal title to the estate was established in the person of Alves, with infestment and registration, long before any claim was made, or mentioned to be made, by the next Protestant heir.

Though the respondent, therefore, were next Protestant heir to the said William MacCartney, which he is not, and though William had not succeeded till after the act 1700, and had actually been convicted of Popery, yet the respondent cannot pretend as next Protestant heir to overturn the title of the appellant.

The respondent is so far from being next Protestant heir to the said William MacCartney, that he is in no way related, either to him or to his father Gilbert, to whom the estate belonged; and therefore he has no title to object Popery to the said William, or to any person deriving right from him.

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this collection.

The right of William Alves to the said estate of Conheath was set up and produced against this very respondent upwards of ten years ago, in a former action, brought by the respondent for establishing his right to the said estate; and all the pretences of the respondent were then set aside; though he had as much right at that time as he has now to enter as next Protestant heir. The title of the appellant's author Alves was made public by adjudication prior to, and was saved by a proviso in the act 1700, and by the act 3 G. I. c. 18. in favour of Protestant purchasers.

#### *Heads of the Respondent's Argument.*

The estate in question belonged to the respondent's grandfather, to whom he was served heir. Elizabeth, the respondent's mother, never having been served heir to her father, had no title in her person, and consequently could make no conveyance to MacCartney her second husband. And although such conveyance had been effectual, yet MacCartney was never seised in these lands, nor did William his son serve heir of provision to him; consequently neither father nor son having a title, the son could make no conveyance to Alves. Besides, the conveyance made by the respondent's mother to MacCartney does not entitle him to the fee of the lands, but only to the rents and profits during his life, and to the heirs to be procreate betwixt them, &c. Even though there had been a title in the person of Gilbert MacCartney, yet William his son had no right; for Agnes MacCartney, daughter of the first marriage, who was a Protestant, was served heir to her father, and thereby the right established in her person, and she conveyed the same to the respondent. The respondent, therefore, had an undoubted title to call in question any conveyance that could be made by any of them.

The words of the act 1700 are express "That no person professing the Popish religion, past the age of fifteen years, shall be capable to succeed to any person whatsoever." This is in other words to say, "That no Papist shall hereafter be capable to serve as heir, to any person whatsoever," because till such service, the estate is not fully vested in the person succeeding. And therefore it follows, that though the person last seised died before the act 1700, yet the next in succession *not being served heir* before that time, he was rendered incapable to serve after the passing of that law.

Not

Nor can there be any *bona fides* in this case; for if William MacCartney's right be null, the title flowing from him can be no better; especially where the appellant is not a purchaser on the faith of any thing upon record, but is only purchaser of a right *remaining personal* from an apparent Popish heir, who died without establishing any title in his person. And, besides, in this case the appellant, before his purchase, had notice of the respondent's claim, and of his serving heir to his grandfather.

The act 1700 also enacts, "that if any person or persons educate in the Popish religion shall happen to succeed as heirs to their predecessors, or any conveyance shall happen to be made in their favour from a person to whom they might succeed as heirs before they attain the said age; then and in either of these cases, they shall be holden and obliged to purge themselves of Popery before they attain the age of 15 years, by the formula" therein mentioned. "And if they neglect or omit to renounce Popery as aforesaid, then and immediately thereafter their right and interest shall become void and null, and shall devolve and belong to the next Protestant heir or heirs," &c. By the words "educate in the Popish religion," is meant, one residing in a family with his Popish parents, under their influence, instruction, and example. This was the case of William MacCartney; all his right to the estate devolved to him before his age of 15, and it is proved, that he was born of Popish parents, and lived in the family with them till he was 15 years of age; that he was habite and repute a Papist during his abode in Britain, which was till his age of 21 years, and it did not appear that he ever took the formula.

Nothing is more certain, than that inquiry may be made even after the death of the person whose right is voided, whether he was in his lifetime under the incapacity mentioned in the said act. And there was no necessity for requiring William MacCartney to take the formula; for the act 1700 declared, that if he neglected or omitted (not if he refused) to take the formula, his right should be null, and should devolve upon the next Protestant heir. The appellant, therefore, should have proved that MacCartney did renounce Popery in terms of the act; but this he did not so much as attempt.

The act 3 G. 1. c. 18. relates only to disabilities arising from the acts concerning Papists in England; but has no reference to the acts of parliament in Scotland. Besides, the appellant has not made the least proof of any valuable consideration given for his purchase.

Nor can the appellant derive any advantage from the decision in the former appeal; that was merely a question between the respondent and his mother, and younger brother, a Papist, in whose favour the mother wished to disinherit the respondent. It consisted solely of this point, Whether the respondent had a right to the premises during the lifetime of his mother? for the several conveyances were only held in trust for the respondent's younger brother; and though the premises were then adjudged to the

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respondent's mother, in preference to him, still he is not thereby precluded from insisting in the present question after her death.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutors or decrees therein complained of be affirmed.*

For Appellant, *C. Wearg. Dun. Forbes. Cha. Erskine.*

For Respondent, *C. Talbot. Will. Hamilton.*

In this case both parties enter into a discussion of the proof led of Wm. MacCartney's Popery; but nothing can be distinctly stated thereon.

Case 126. Sir John Schaw, of Greenock, Bart. - *Appellant*;

Dame Margaret, the Widow of Sir John  
Houston, Bart. Sister of the Appellant - *Respondent.*

2d April 1726.

*Presumption.—Intromission with the Settlements of a Person deceased.—Proof.*—In a reduction of a mother's settlements brought by her son and heir, against a sister, who was benefited by them, on the ground that the sister had access to the repositories of the deceased, and took what she chose, and might have destroyed the rest; the sister stated in defence that the deeds had been given to her by her mother: it was necessary for the pursuer to prove that the defender's intromission was unwarrantable.

The deeds produced were presumed to contain the last will of the deceased.

A circumstantial proof, brought by the pursuer, that the deceased had declared that she had made other settlements, and of embarrassment on the part of the defender, found insufficient.

**BY** a contract, executed in April 1677, previous to the marriage of Sir John Schaw and Helenor Nicholson, the father and mother of the appellant and respondent, in consideration of the then intended marriage, and of the portion of Dame Helenor, (which was very considerable), the lands of Easter Greenock were settled upon her in life-rent, for her jointure; and she was likewise provided to the life-rent of one-third of all the real estate, which should be acquired by Sir John during the marriage, and to one-third of all the household furniture.

After the marriage, the lands of Carnock and Plain descended to the said Dame Helenor and her two sisters, as heirs portions; the yearly value of the whole being about 833*l.* 6*s.* 8*d.* sterling.

By articles of marriage, in March 1700, between the appellant and Margaret, the daughter of Sir Hugh Dalrymple, President of the Session, it was agreed that the said lands of Easter Greenock should be settled upon the appellant and his then intended wife; and accordingly Dame Helenor released the same of her life-rent. By another deed, of same date, Sir John, the father,

in

in consideration of such release by Dame Helenor, bound himself to pay her 2500 merks Scots *per annum* for her life in case she should survive him.

On the 19th of August same year, Dame Helenor, by a deed reciting, that it was agreed between Sir John Schaw the father, and Dame Helenor his wife, that she should renounce her right to the household furniture, the acquired estate, and other provisions made for her by the marriage settlement; and also that she should make a settlement of her estates of Carnock and Plain to herself in life-rent, and to the appellant her son in fee, subject to a power to Dame Helenor to burden the same with any sum not exceeding 50,000 merks Scots; and that Sir John the father should oblige himself and his heirs to pay her an annuity of 8000 merks Scots so long as she should continue his widow; therefore released all the provisions made for her by her marriage contract, and settled her part of the estates of Carnock and Plain accordingly. And of same date, Sir John the father with the consent of the appellant, by his bond reciting the last-mentioned deed, and in consideration thereof, obliged himself and his heirs to pay to Dame Helenor an annuity of 8000 merks, so long as she should continue his widow. To both these deeds President Dalrymple was a subscribing witness.

Sir John the father died in 1702, leaving the appellant and respondent, his only children: and Dame Helenor afterwards remained a widow during her life. After the father's death, disputes arose between the appellant and his mother, on the question whether she was entitled to the annuity of 2500 merks, contained in the deed of March 1700, or to the annuity of 8000 merks contained in the bond of 19th August 1700. In 1709 she brought her action against the appellant, for this last-mentioned annuity, before the Court of Session: to this action the appellant appeared, but the cause was delayed for some time by his insisting on his privilege of parliament.

The appellant afterwards brought an action for reduction of the said bond of 19th August 1700, upon the ground that the settlement of the estates of Carnock and Plain, which was the valuable consideration for the same, did not exist; and in his libel he set forth, "that the lady did at diverse times declare before several witnesses, and particularly upon the 7th of June 1702, that she had cancelled that disposition some days before she was delivered of a posthumous child; and that when she did sign the said disposition, it was retained in her custody, and she then declared, that she would consider these deeds further, and if they did not please her, she would tear them." Dame Helenor denied that she had cancelled the deed, but that the same was absolute and irrevocable on her part; she also offered to execute a new deed to the same effect, or to prove the tenor of the original settlement. She accordingly brought an action for proving the tenor of the deed, which she alleged was cancelled by accident, and in her libel set forth the words thereof at length. To this action the appellant pleaded, that it was not competent to prove the

the tenor of a deed without first proving and particularising the *casus amissionis*; that Dame Helenor must be presumed to have been the destroyer of the Deed, because it bore not to have been delivered, and must be presumed to have remained in her custody, in order to its being ratified if she thought fit; and that it never was ratified by her. With regard to the proposal to renew the deed, Sir John stated, that the original being cancelled, the grant of the annuity was also cancelled; and that by the cancelled deed as set forth in the libel Sir John the father had concurred in several grants and provisions in favour of his son, which could not be restored by Dame Helenor's act or deed.

The Court on the 19th of July 1711, "Found that Dame Helenor having the disposition cancelled in her hands, and never ratifying the same judicially, presumed in law that it was cancelled by herself, and therefore that the obligations on Sir John by the bond are dissolved." Against this interlocutor, Dame Helenor next day entered her protest for *remeid* of law; but presented no appeal to the House of Lords.

Sir John afterwards offered to refer it to the oath of his mother's counsel, whether they had not seen the cancelled deed in her custody; but having declined to depone, the Court on the 25th of July 1711, "In respect that in the debate Dame Helenor's having the cancelled disposition in her custody was not refused, and that her advocates refused to appear to give their oaths of calumny because of the appeal interposed, assolizied the said Sir John Schaw (a)."

Dame Helenor prosecuted her appeal no further; but on the 6th of September 1711, she executed five several deeds for a settlement of her estate and effects, while she had in view the endeavouring to obtain a reversal of the decree of the Court of Session. Three of these deeds were executed to take effect in the event of the decree being reversed, and were of the following nature: First, a disposition of her share of the estate of Carnock and Plain, to herself in life-rent, and to the appellant her son in fee, reserving a power to charge the same with 50,000 merks Scots, and providing that the disposition should be void, if she should not be found entitled to the said annuity of 8000 merks, or in case the appellant should not pay her the same: Second, an assignation to the respondent of all the arrears of the said annuity due and to become due, subject to a power of revocation: and third, a deed charging the said estate with the payment of 49,000 merks to the respondent, pursuant to the reservation for that purpose.

The two other deeds were executed to take effect in case she should be found to have no right to the annuity of 8000 merks, and were of the following nature: First, a settlement by way of entail of the said estate of Carnock and Plain to herself in life-rent, and to the respondent her daughter and the heirs of her body; whom failing, to such persons as Dame Helenor should

(a) These two interlocutors were the subject of the subsequent appeal, at Lady Houston's instance, against Sir John Schaw, No. 123 of this collection, to which appeal the foregoing statement of facts and precedents is an introduction.



appoint by any writing under her hand; whom failing, to her own heirs and assignees: and second, an assignation to the respondent of the provisions in the marriage-contract in Dame Helenor's favour, particularly the arrears of the life-rent of 2500 merks secured to her, upon her renouncing her jointure out of the estate of Easter Greenock.

All these deeds contained powers of revocation, and none of them were delivered or put upon record, but the whole were retained in Dame Helenor's own custody. No alteration was made upon these settlements till about a month before Dame Helenor's death. On the 26th of February 1722, she executed an assignation of all her personal estate in favour of the respondent, subject to the payment of such debts and legacies as she should at any time give, with a power of revocation. On the 3d of March thereafter, she executed a deed reciting the former settlement of the estates of Carnock and Plain in 1711, and that the same was subject to a power of revocation; therefore she so far varied it, as to settle the same upon the decease of the respondent, and failure of heirs of her body upon Mrs. Maria Schaw, daughter of the appellant, and the heirs of her body, with several other substitutions of heirs, the last of them being to her own heirs whatsoever; and she directed, that this should be considered as part of the former deed 1711. Of same date she executed an assignation to the respondent of the arrears of the said annuity of 2500 merks: and the respondent executed a back bond, obliging herself to apply all the money she should receive of this last-mentioned annuity in the purchase of lands to be settled in the same manner as the said estate of Carnock and Plain was. On the 5th of March she executed in favour of the appellant's grand-daughter Miss Helenor Cathcart an assignment of several bonds to the amount of 2000 merks; and about the same time she assigned to Mrs. Helenor Houghton, the respondent's daughter, a bond of 500*l.* sterling. All these deeds executed by Dame Helenor contained powers of revocation, and clauses dispensing with the delivery. She died on the 20th of said month of March 1722; and it came to be a question between the parties, which is the subject of the present appeal, whether Dame Helenor had not of a date subsequent to the settlements last mentioned, executed other deeds, conveying her estate, particularly the estate of Carnock and Plain, to the appellant.

Immediately after Dame Helenor's death, one of the baillies of Edinburgh, where she died, came and sealed up the presses, cabinets, and repositories, at the desire of the appellant. But when these were opened, the only deed that was found was the assignation in favour of Miss Helenor Cathcart, the appellant's grand-daughter, executed on the 5th of March 1722.

The appellant thereupon commenced an action of exhibition *ad deliberandum* before the Court of Session, against the respondent; and the respondent produced all the deeds before mentioned conceived in her favour. The appellant afterwards brought an action of reduction and declarator against the respondent, to have all these  
deeds

deeds set aside, on the ground, that the respondent had illegally and unwarrantably possessed herself of her mother's keys, and of her mother's strong box, in which she kept her deeds and writings; and that she had carried away these deeds and writings out of the house two days before her mother's death; which, it ought to be presumed, were done without her mother's consent: and that the respondent having had it in her power to preserve what might be for her interest, and to destroy what was not so, she had rendered her mother's will uncertain, therefore all the deeds executed in her favour ought to be declared void; or, the same being subject to a power of revocation, it ought to be presumed they were revoked; and the whole real and personal estate ought to be decerned to the appellant.

To this action the respondent stated as her defence, that what she had done was by her mother's authority; that she possessed herself of no deeds but which appeared to be properly belonging to her, and which, being in her custody, must be presumed in law to have been delivered to her; and that the mother had never altered or shewed any intention to alter any of these deeds. The Court, in July 1723, allowed both parties to prove their allegations, and many witnesses were examined.

The import of the proof appears to have been (for it cannot be distinctly stated on either side) that three nights before the old lady's death, the respondent's lawyer and agent were brought by her into the house, and the several deeds then carried away: no direct authority from the mother herself was proved for this: female witnesses about the person of the deceased swore that before her death, she had declared that she had settled all affairs between her children; that she had forgiven the appellant of all her claims, and even given him a *gripe* of the estate of Carnock; she mentioned too that she had left legacies to the mistress of Cathcart and to Colonel Cathcart, &c. and a donation to the poor of the parish, but none of those appeared.

On the part of the respondent it was proved by the writers and witnesses of the deeds which appeared, that they knew of no other deeds having been executed; and in a condescence, given in by her, she denied all the allegations of the appellant. The cause coming to be heard, the Court, on the 22d of June 1725, "Found, that it was not proven, that the respondent's intromission with her mother's strong box and writings was unwarrantable."

The appellant reclaimed, and after answers for the respondent, the Court, on the 20th of July 1725, "Found that the deeds in favour of the respondent, and of Mrs. Helenor Cathcart, and Mrs. Helenor Houston, are presumed to contain the last will of the deceased concerning her succession; and that no evidence arises from the proof adduced by the appellant, that the deeds in favour of the respondent were altered or revoked in his favour; or that the deceased concealed or embezzled any of the deceased's writings; and therefore assilized the respondent from the reasons of reduction insisted on."

The

The appeal was brought from "an interlocutory order of the  
 " 22d of June 1725, and an order or decree of the 20th of July  
 " following, made by the Lords of Session."

Entered  
 25 Jan.  
 1725-6.

*Heads of the Appellants' Argument.*

Though evidence of the kind adduced by the appellant be not *per se* absolute and conclusive, yet when the respondent, by her clandestine and unwarrantable intromission, rendered the will of the deceased uncertain, conjectural evidence and presumptions must supply the place of direct proof: nothing could be easier than for the respondent to prevail on the writer and witnesses of the papers which must have been executed not to offer a discovery voluntarily.

The respondent insisted, that it was unnatural to suppose, that a settlement, the work of so many years, and in which it appears that the old lady had persisted till the 3d of March, 17 days before her death, should have been altered in the remaining short term of her life; at least that it was not to be believed without direct evidence. But this general observation did not militate against the appellant; the last of the deeds in favour of the respondent was dated on the 3d of March before Dame Helenor's death, and the only one produced in the appellant's favour was dated on the 5th of March, two days later: as that alteration was made, in those two days, the remaining period of the old lady's life left time enough for the other alterations.

*Heads of the Respondent's Argument.*

The several deeds in favour of the respondent were really and truly executed by her mother, at the respective times they bear date, and the latter of them, which confirmed the former one, executed so short a time before the lady's death, that there can be no foundation for presuming that any alteration was made.

By the law of Scotland, it is not necessary to prove the actual delivery of any deed; but if it be out of the possession of the grantor, it is presumed to have been lawfully delivered, unless it be proved, that the person possessed of such deed came by it in an unwarrantable manner.

No proof was made of giving instructions to revoke any of those deeds, or to prepare others in favour of the appellant. Deeds solemnly executed, cannot, without shaking the securities of all property, be set aside on pretence of such slender evidence of words spoken, at best ambiguous in themselves, or upon pretended presumptions, without any real foundation on facts.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory order and decree therein complained of be affirmed.*

Judgment,  
 2 April,  
 1726.

For Appellant, *Dun. Forbes. C. Talbot.*

For Respondents, *C. Wearg. Ro. Dundas. Will. Hamilton.*

Case 127. Major Thomas Cochrane - - - *Appellant;*  
 Robert Lord Blantyre - - - *Respondent.*

4th April 1726.

*Costs and Expenses.*—Trust bonds granted conditionally, if the grantor should procure two commissions held by the grantee, of which he then executed resignations, are reduced upon the ground, that though the grantor held the said resignations in his hands, he did not procure the new commissions in virtue thereof, but in consequence of other means and considerations: but the Court having refused the pursuer his costs, the judgment is reversed, and it is ordered that the Court do cause these costs to be taxed and ascertained and forthwith paid to the pursuer.

*Appeal.*—The pursuer having craved that the bonds might be delivered up to him by the clerk, but the defender having stated that he meant to appeal, and the Court having ordered the bonds to remain in process, and not to be delivered up without a fresh warrant, their judgment is affirmed.

**T**HE respondent being captain in a regiment of foot, commanded by General Whetham, and fort-major of Fort St. Philip in Minorca, in 1715, upon the death of his elder brother Lord Blantyre, left that island and returned to Great Britain. On the 9th of March 1715, the appellant and respondent bargained together for the said two commissions; the respondent put into the appellant's hands two several *demissions* of the same; and the appellant granted two bonds to the respondent for the agreed price, both dated the 10th of March 1715. The bond for the company run in the following terms: "I Cornet Thomas Cochrane, of the Royal Gray Dragoons, inasmuch as Robert Lord Blantyre has, by his demission of the date the 9th inst. demitted and resigned in my favour his post as captain in General Whetham's regiment of foot; therefore I hereby bind and oblige me, my heirs and successors, to make payment to the said Robert Lord Blantyre, his heirs, executors, and assignees, the sum of 600*l.* sterling money, and that immediately and how soon a commission shall be issued in my favour upon the afore-said demission." The other, with regard to the fort-majority, was to the same purpose, with this variation, that the sum thereby to be paid was 300*l.* in six months after the issuing a commission in the appellant's favour for the said post of fort-major, upon the respondent's demission.

The appellant soon after did procure a company in the said regiment, not that which the respondent had held, but one vacant by the promotion of a Captain Cope, whereas a Captain Stammers succeeded the respondent in his company. For the commission obtained by the appellant he paid 400*l.* to Captain Cope; the new commission was signed by the king upon the 23d of January 1716; and the appellant, on the 25th of December preceding, got a commission to be fort-major of Fort St. Philip. But disputes arising between the parties as to the means by which the appellant obtained these two commissions, he brought an action against the

the respondent before the Court of Session to reduce the said two bonds, upon this ground, that the condition on which they were to be paid, was, that the appellant should obtain the commissions upon the respondent's demissions and that such condition had not taken place. The respondent brought his counter action against the appellant for payment of the sums contained in the bonds; and these two actions were conjoined.

The appellant on his part stated, that the respondent had been ordered to his post by the governor of Minorca, and, upon his disobedience of orders, he was dismissed the service: that his company was given to a Captain Stammers in October 1715, and the appellant thereupon entered into a treaty for the purchase of Major Cope's company, for which he paid 800*l.*; and that he obtained his commission as fort-major, after the respondent had been dismissed the service, upon the solicitations of his own friends.

The respondent on the other hand, contended, that the appellant having got these two demissions from the respondent, and having soon after obtained his two commissions, it ought to be understood, that he got them by virtue of the two demissions; especially since the appellant never returned them, nor intimated to the respondent that they had not been accepted.

Various witnesses were examined in this matter; by the evidence of General Whetham, Major Cope, and Captain Stammers, relative to the captain's commission, it appeared, that Captain Stammers paid nothing for the commission granted to him, then an officer on half pay, and that Major Cope had received 800*l.* for his company. Relative to the commission as fort-major, Sir Anthony Westcombe, secretary to the then governor of Minorca, deposed, that he wrote two letters in 1715 to the respondent to attend the service in Minorca, in one of which was inclosed a letter from the governor, informing him that he would be dismissed if he did not return to his duty; and that accordingly about the 5th of June 1715 the governor wrote a letter to the then secretary at war, to move his majesty for a commission to the appellant as fort-major.

The Court, on the 17th of July 1725, " Found it to be presumed, that the appellant purchased the company with his own proper money, and that the respondent's proof did not take off that presumption: and found it likewise to be presumed that the appellant obtained the fort majority upon the respondent's being dismissed from the service, and not upon his demission; but reserved the consideration till next hearing how far the appellant was in *bona fide* to accept of a commission in the above terms, on the supposition that he was employed to negotiate the demission for the respondent."

After a hearing upon this reserved point, the Court, on the 22d of July, " Found it not relevant to make the appellant pay the 300*l.* contained in the bond relative to the fort-majority, that he did procure a commission to be fort-major gratuitously after the respondent was dismissed the service,

" *cv. n*

" even though he had the demission in his custody, and had  
 " not acquainted the respondent of the way he obtained the said  
 " commission; and, therefore, and upon the grounds in their  
 " former interlocutor, reduced the said two bonds, and decerned;  
 " *but refused to allow the appellant his expences.*" Of these ex-  
 pences he had presented an account, amounting to 217*l.* 19*s.* 2*d.*  
 sterling.

The appellant afterwards applied by petition to the Court,  
 praying, that the bonds might be delivered up by the clerk in  
 court to be cancelled by the appellant; but the respondent having  
 stated in answer, that he intended to appeal to the House of Lords  
 from the decree of reduction, the Court on the 30th of July 1725  
 " Ordained the bonds to remain in the process, and not to be  
 " delivered up to either party without a warrant."

Entered,  
 28 Jan.  
 1725-6.

The appeal was brought from " so much of an interlocutor of  
 " the Lords of Session of the 22d of July 1725, whereby they  
 " refused to allow the appellant his expences; as also from an  
 " interlocutor of the 30th of the same July."

#### *Heads of the Appellant's Argument.*

It is against all law and reason to deny a party his full costs,  
 when by the wilfulness of his adversary, he is put to extraordinary  
 charge.

Expences and costs of suit are more particularly to be allowed,  
 where the fact contested is presumed to be consistent with the  
 knowledge of the party who contests it. Now it appears by the  
 evidence of Sir Anthony Westcombe, that many months before  
 the appellant had either of the commissions, the respondent was  
 ordered by repeated letters in March and May 1715 to repair to  
 his post, and acquainted that if he did not, he would be dismissed  
 the service.

The refusal to give up the bonds upon the respondent's pre-  
 tending that he purposed to carry on an appeal, is unprecedented,  
 and may be attended with bad consequences: nothing less than  
 an order of the House of Lords, upon a petition and appeal, duly  
 served upon the respondent, can stay proceedings upon any judg-  
 ment or decree of the courts of justice.

#### *Heads of the Respondent's Argument.*

As the appellant was pursuer in the action of reduction, the  
 respondent had good reason to defend it, until at least it should  
 be proved, that the appellant got the commissions some other way  
 than in pursuance of the demissions given him by the respondent;  
 and until it was proved, that the respondent was dismissed his  
 majesty's service, and that his demissions were not accepted of,  
 the proof lay upon the appellant. As he was to make out facts  
 which the respondent had no knowledge of, and had no reason to  
 believe, since the appellant did not inform him of them, it were  
 unreasonable, though the proof had been ever so clear, to have  
 charged the respondent with expences. But the proof is so far  
 from being clear, that the judges do not find the fact proved, but  
 only

only that it was presumed to be as the appellant stated it, from the evidence which was brought. The decree in favour of the appellant reducing the bonds, is equal to a discharge; and so long as that decree stands unimpeached, no benefit can be made of these bonds against the appellant, and they are equally safe for both parties, when in the custody of the Court, and not to be delivered out without a warrant.

After hearing counsel, *It is ordered and adjudged, that so much of the interlocutor of the 22d of July 1725, as is appealed from, be reversed; and it is further ordered and adjudged, that the Lords of Session do cause the appellant's costs and expences to be taxed and ascertained; and that the same, when so taxed and ascertained, be forthwith paid to the appellant by the respondent: And it is further ordered, that the other interlocutor complained of in the said appeal be affirmed.*

Judgment,  
4 April  
1726.

For Appellant,	Dun. Forbes.	C. Talbot.
For Respondent,	Ro. Dundas.	Will. Hamilton.

Dame Margaret Houston, Widow of Sir  
John Houston, Bart., Assignee and Exe-  
cutrix of Dame Helenor Schaw, the  
Mother of the Appellant and Respondent, *Appellant*;  
Sir John Schaw, Bart. - - - *Respondent*.

Case 128.

Forbes,  
5 Jan.  
22 June  
1709.  
19 July  
1711.

20th April 1726.

*Proving the Tenor.—Presumption.—Mutual Obligation.*—In an action by a mother against a son for proving the tenor of a deed executed by her during her husband's life, it is found that the pursuer's having the disposition cancelled in her hands, and never ratifying the same judicially, presumed that it was cancelled by herself.

This cancelling dissolved the obligations of a bond, granted by her husband in consideration of said disposition.

In regard the pursuer's counsel did not deny that the cancelled deed was in her hands, and refused to give their oaths of calumny thereon, the defender is absolved.

*Costs and Expences.*—These interlocutors pronounced in 1711, are appealed from after the death of the pursuer, by her daughter and executrix, but are affirmed with 50*l.* costs.

IN the process between Dame Helenor, and the respondent, relative to the annuity of 8000 merks claimed by her, and the proving of the tenor of the bond, by which the same was granted to her, which are fully stated in the other appeal, between the present parties (No. 126 of this collection), the Court of Session, on the 19th of July 1711, “ Found that Dame Helenor  
“ having the disposition cancelled in her hands, and never ratify-  
“ ing the same judicially, presumed in law, that it was cancelled  
“ by herself, and therefore that the obligations on Sir John by  
O o “ the

"the bond are dissolved." Against this interlocutor Dame Helenor protested for remeid of law, but did not present an appeal to the House of Lords.

The present respondent afterwards offered to refer it to his mother's counsel, whether they had not seen the cancelled deed in her custody; but they declined to depone, and the Court, on the 25th of July 1711, "In respect that in the debate, Dame Helenor's having the cancelled disposition in her custody was not refused, and that her advocates refused to appear to give their oaths of calumny, because of the appeal interposed, affoizied the said Sir John Schaw."

Entered,  
25 Jan.  
1725-6.

The appeal was brought by the appellant as executrix of her mother from "two decrees of the Lords of Session made the 19th and 25th days of July 1711."

*Heads of the Appellant's Argument.*

The bond for payment of the annuity of 8000 merks, executed by Sir John Schaw the father, with consent of the respondent his son, was for a full and valuable consideration, given at the time of executing that bond, equal to the annuity, *besides* the settlement Dame Helenor made of her estate of Carnock and Plain in favour of the respondent, at same time, and as a part of the consideration of the annuity.

The settlement in question never was produced, so that it could not appear whether it was ratified or not, if that had been necessary: nor was any proof made or attempted to shew that it was cancelled, much less that it was cancelled by Dame Helenor. No inference ought to be drawn from her counsel's not appearing to answer upon oath: this was an unusual proceeding, and ought not to have been allowed. Their reason for not appearing was, because, after the interposing of the protest for *remeid* of law, the appearing at any further proceeding in that court might have been construed as a passing from the appeal. Besides, it is immaterial whether the cancelled deed was in Dame Helenor's hand or not; it might have come to her accidentally after her husband's death; or she might have recovered it from the custody of third parties, and have shewn it to her counsel, to be advised as to the import and effect of it: therefore, though her counsel had seen it in her custody cancelled, it would have been no evidence that it was cancelled by her. Dame Helenor, in the whole course of the action, absolutely denied that she had cancelled the said settlement, and therefore it was not, as the appellant conceives, consistent with the rules of justice or equity to presume that she had done so.

But supposing the said Dame Helenor had cancelled the deed (which she did not), her cancelling it would not have avoided the covenants of it, and the tenor might easily have been proved: she offered, too, to have executed a new deed to the same purport, which she afterwards actually did.

*Head*



*Heads of the Respondent's Argument.*

Though by the accident of the old lady's living, and not marrying again, the cancelling of the conveyance came to be of no consequence: yet if she had died, or married a second time soon after her first husband's death, the consequence would have been no less than the loss of the fee of the estate of Carnock and Plain to the respondent, which, the disposition being cancelled, he then could not claim. The act, therefore, that cancelled that disposition, defeated the annuity dependant upon it; and nothing can be more unequal than to suppose in the old lady a power of defeating her own deed by cancelling it, and at same time of preserving the obligation to pay the annuity which was the consideration for making it, and renewing the same disposition at the distance of many years, when the growth of those annuities made it advantageous to claim them.

But in reality the appellant is not properly entitled to carry on this appeal; her right to do so is dependant upon the deed in 1711, which was revocable, and was in effect revoked by the deeds of 3d March 1722, the final settlement of the old lady's estate, whereby she settled her whole real and personal estate, upon a certain line of heirs of entail, and considered nothing to be her estate but the lands of Carnock and the annuity of 2500 merks. These, containing the last will and settlement of the deceased, must be considered as a revocation of the former conditional grant of the annuity of 8000 merks, made by her when she was out of humour at the decree of the Court of Session, and when she intended to prosecute an appeal, a purpose that in the remaining course of her life she never took any step to proceed with, and consequently must be presumed to have relinquished upon after-thoughts.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the decrees therein complained of be affirmed: and it is further ordered, that the appellant do pay, or cause to be paid to the respondent, the sum of 50l. for his costs, by reason of bringing the said appeal.* Judgment, <sup>prid</sup> 1726.

For Appellant, P. Yorke. Will. Hamilton.  
For Respondent, Dun. Forbes. C. Talbot.

Cafe 129. James Marquis of Clydesdale, an Infant of  
 tender Years, by James Duke of Hamilton  
 and Brandon his Father - - - *Appellants;*  
 Thomas Earl of Dundonald - - - *Respondent.*

Kaimo,  
 26 Jan.  
 1726.  
 Nos. 70, 71,  
 72, 73, 74.

*Et e contra.*

2d April 1726.

*Minor.*—A minor, though with consent of his curators, could not gratuitously alter the settlements of his estate.

*Death-bed.*—Neither could he gratuitously alter them on death-bed.

*Tailzie.*—A tailzie executed in 1726, not registered in th. Register of Tailzies, sustained in 1725 as a title on which to serve heir of provision.

*Return.*—A clause of return to the grantor of a deed after failure of heirs male, did not disable the heir in possession gratuitously to alter in favour of his daughters.

*Destination simple.*—Nor did a simple destination to heirs male in several deeds hinder this.

*Prescription.*—*Base Infesment.*—*Hereditas Jacens.*—A base infesment is taken by a son on dispoitions from his father in 1653 and 1656. In 1680 the father, after the son's death, resigns these lands by a procuratory of resignation, and takes new charters from the crown, under which the lands are held till 1725, without making up titles under the son's base infesment. The objection of prescription is repelled. An objection that though the base infesment contained lands in two counties it was only registered in one, is repelled. And it is found that these lands being still in *hereditas jacens* of the son, a title to them could only be made up by a service to him.

*Apparent Heir.*—One passing by an apparent heir three years in possession not liable to implement such apparent heir's gratuitous bond of tailzie.

*Confratation.*—A deed is executed, by which the grantor obliges himself and his heirs male, and of tailzie, provision, &c. upon failure of heirs male of his own body, and heirs male of the descendants of his body, to resign the same for infesments to his daughters and the heirs male of their bodies without division, &c.; in a competition between the heir male of the body of his eldest daughter, and a person claiming as heir male of the descendants of his body, the former is preferred.

BY a contract, in September 1653, executed previous to the marriage of Wm. Cochran, eldest son of Wm. Lord Cochran, (afterwards created Earl of Dundonald,) with Lady Catherine Kennedy, daughter of the Earl of Cassillis, the said Wm. Lord Cochran obliged himself and his heirs to settle the lands of Ochiltree and Cochran, and others in the counties of Ayr and Renfrew, upon William the son, and the heirs male of the marriage; whom failing, to return to the said Lord Cochran himself, and his heirs and assignees for ever; reserving to himself his life-rent of the whole lands, except the house of Ochiltree, and an annuity of 5000*l.* Scots for the son's maintenance during his father's life; and also reserving a power to redeem all the said estate, except the lands of Ochiltree and Trabrough, upon payment of ten merks Scots. This deed contained a procuratory of resignation, and a precept of sasine; and after the marriage took place, the son took an infesment on the precept of sasine, but took no step in virtue of the procuratory of resignation in procuring

curing new titles from the Crown the superior. Part of the lands in which the son was infeft lay in the county of Ayr, and part in the county of Renfrew; but his sasine was only registered in Ayrshire.

In January 1656, a contract was executed between William Lord Cochran and William his son, whereby the son reconveyed to the father the lands of Ochiltree and Trabrough, in consideration whereof the father conveyed the lordship of Paisley, and other lands, to the son, and the heirs male of his said marriage, whom failing, to return to the father, reserving the father's life-rent, with the exception of some lands particularly mentioned, and with the exception of an annuity of 1000*l.* Scots, issuing out of part of the lands for the son's maintenance during his father's life. This contract also contained a procuratory of resignation and precept of sasine; but as Lord Cochran was himself only infeft base under the person from whom he acquired these lands, he obliged himself to procure his own infeftment to be confirmed by the Crown the superior. The son however only took a base infeftment under the precept of sasine.

A contract was afterwards executed, in 1657, betwixt the father and son, whereby Lord Cochran renounced the right of redemption reserved to him in the settlement 1653, and in consideration thereof the son obliged himself to give security for 20,000*l.* Scots to any of his father's creditors, or to grant bond for that sum at his father's option: and accordingly in December 1658 he granted a bond to his father for that sum.

The father afterwards in 1659 and 1662 obtained charters from the Crown of the lands contained in the before mentioned conveyances to his son, to him and his heirs and assignees whatsoever; upon which charters he was duly infeft. And he afterwards acquired other lands, the titles of which were taken to himself in life-rent, and to William his son, and the heirs male of his body in fee; but as to part of these purchases, particularly the lands of Kirkmichael and Dalmuir, the father reserved a power to sell and dispose thereof, and to charge the same with debts at his pleasure without consent of the son. In those new purchased lands, William the son took infeftment under the dispositions thereof.

In 1669, William Lord Cochran was created Earl of Dundonald; and in 1679 William the son, then William Lord Cochran, died in the lifetime of his father, leaving issue John his eldest son and heir, and several other children. This John, now John Lord Cochran, made up no title to his father by service.

In July 1680, the Earl of Dundonald executed a procuratory of resignation as well of the lands which he possessed in fee simple, as of the lands in which his late son was infeft, proceeding upon the recital that " he was absolute proprietor of the whole lands, " and had power reserved to him, so far as concerned any of the " lands, wherein the deceased William Lord Cochran his son was " infeft in fee, to dispose the same at any time in his life to any

" person he pleased, without consent of his son." He thereby obliged himself to resign the whole lands " to and in favours of John Lord Cochran his grandson, and the heirs male of his body ; whom failing, to William Cochran his second grandson, (father of the present Earl) and the heirs male of his body ; whom failing, to his 3d and 4th grandsons successively, and the heirs male of their bodies ; whom failing, to the Earl himself, and the heirs male of his body ; whom failing, to his heirs whomsoever, reserving his own life-rent of the said estate." It contains also this clause, " that the said John Lord Cochran the grandson, and the other heirs therein substituted, should be obliged to pay and perform all the debts and deeds of the Earl, and that he should have power to sell and dispose of the said estate without consent of his said grandson or the other heirs : " and it contained a power of revocation. A crown charter was in consequence obtained in terms thereof, with an additional clause to this purpose, that " in case heirs female should succeed, the eldest should exclude heirs portioners, and they and their descendants should assume the name of Cochran, and carry the arms of the family of Dundonald, or otherwise should lose their right of succession." In virtue of this charter John Lord Cochran took infestment in the lands therein contained.

In November 1684, by a contract executed previous to the marriage of John Lord Cochran with Lady Susanna Hamilton, John Lord Cochran obliged himself to purchase and obtain himself infest and seised as heir to the said William Lord Cochran his father in all such of the lands and others therein mentioned, as his father died last vest and seised in, without any power to the said Earl of Dundonald to dispose thereof in his lifetime ; as also to procure himself infest in other lands therein mentioned, which had been purchased by the Earl of Dundonald, and conveyed to himself in life-rent, and to William Lord Cochran his son in fee (a) ; and the said William Earl of Dundonald and John Lord Cochran thereby bound themselves and their heirs to make resignation of the whole lands aforesaid for new infestments thereof to be granted to the said John Lord Cochran and the same series of heirs specified in the last mentioned charter, with the same clause relative to heirs female ; and William Earl of Dundonald renounced and discharged all the faculties, powers, and liberties reserved to him by the infestments granted to John Lord Cochran, and the deceased William Lord Cochran his father, or either of them, and obliged himself to grant a separate renunciation of the said reserved power ; and John Lord Cochran obliged himself to do no act in prejudice of the heirs male of the marriage, reserving always to him as fiar of the estate a liberty to contract debts, or to sell or dispose thereof for any other cause as he should think fit. This contract also contained a proviso, that the rights formerly granted by the earl to his son should not imply the granting

(a) This contradicted the recital of the procuratory of July 1680, executed by the Earl of Dundonald.

double rights, nor subject him to double warrandice. The earl afterwards in terms of this contract, by a separate deed renounced and discharged all the powers and faculties reserved to him, either by the settlements upon William the son or John the grandson, and such renunciation was registered in November 1684.

The earl died in 1685, and was succeeded in the honours by his said grandson John Lord Cochran. This Earl John in October 1688, executed a bond of tailzie, reciting that he intended to alter the order of succession contained in the settlements of his lands and estates, and obliging himself to surrender the same, to himself in life-rent, and to the heirs male of his body, whom failing, to the heirs female of his body, the eldest heir female succeeding without division; whom failing, to his brothers successively in their order, and the heirs male of their bodies, whom failing, to his own heirs whomsoever, the eldest heir female always succeeding without division. This deed contained prohibitory, irritant, and resolute clauses, upon all those called to the succession, except the heirs male of the grantor's own body: none of the deeds before mentioned, executed by the father or grandfather of Earl John, contained such clauses prohibitory, irritant, or resolute.

Earl John died in May 1690, without being served heir to his father, as he was bound to be by the contract 1684. He was succeeded by his eldest son William, the second of that name, Earl of Dundonald, who was served heir in general and in special to his father; and upon such service was infeft, but died under age. He was succeeded by his brother John, who in 1705 was served heir in general and in special to his late brother, and infeft.

By marriage settlement in March 1706, betwixt this Earl John the second, when under age, with consent of his curators, and Lady Ann Murray, the earl settled the whole lands and estate belonging to the family, to himself, and the heirs male of his body, whom failing, to his heirs male whomsoever, whom failing, to his heirs and assignees whomsoever, reserving a power to alter, in so far as he had power by any tailzies or deeds executed by his predecessors.

In October 1711, the earl having only one son of the marriage, executed bonds of provision to his three daughters in the aggregate sum of 16,000*l.* sterling; and upon the 16th of same month, he executed other bonds of provision to his said daughters for 7000*l.* more, to be a burden on his heirs male not descended of his own body, and succeeding to him in his lands and estate.

On the 29th of December 1716, he executed a bond of provision to his said daughters for 8000*l.* only, and revoked all former bonds of provision granted to them. And on the 31st of same month, he executed a bond of tailzie, reciting, that being fully determined, failing heirs of his own body, or heirs male of any of the descendants of his own body, to settle the succession of his estate in one person; and that the same might not be divided by

the succession of heirs portioners; he therefore bound and obliged himself and his heirs of line, male, conquest, and provision, and successors whatsoever, failing heirs male as said is, to provide and secure heritably, and to make resignation of all and sundry lands, lordships, &c. belonging to him and contained in his rights and infeftments, in the hands of his immediate superiors, to and in favour of Lady Ann Cochran, his eldest lawful daughter, and the heirs male of her body, whom failing to his other daughters therein named, and the heirs male of their bodies, whom failing to his other heirs male whatsoever, whom failing to his heirs or assignees whatsoever, the eldest heir female always succeeding without division.

This Earl John died in June 1720, leaving William his only son, and three daughters, Ann, Susanna, and Katherine. In 1722 Earl William was served heir male and of line to his father, and was thereupon infeft. On the 3d of August 1722, he being still a minor, with consent of six of his curators, executed a procuratory, reciting the said bond and deed of tailzie granted by his father, and that he as heir served and retoured to him, stood bound to implement the same, therefore he granted procuratory to surrender the said lands in favour of his sister Lady Ann, upon failure of heirs of his own body, and in terms of the bond executed by his father.

In January 1725, 14 days before his death, Earl William revoked the said procuratory by a deed signed by him and three of his curators; and he, same day, executed, with consent of these three guardians, a new settlement of his estate in favour of the respondent, his successor in the title, and the heirs male of his body, whom failing to two of his curators (who authorized him to execute the deed), father and son, and with other substitutions, being in favour of the heirs succeeding to him in the title. Earl William died on the 28th of January 1725, under age, and without issue.

After his death a competition arose relative to the property of his estates, between the present parties; the Marquis of Clydesdale, the only son and heir of the said Lady Ann Cochran, the sister of William the last earl, who was married to James Duke of Hamilton and Brandon in February 1723, claiming under the bond of tailzie, executed by Earl John on the 31st December 1716, and procuratory executed by Earl William, contending that the revocation and subsequent deed were void; and the present Earl of Dundonald, the great grandson of the first Earl of Dundonald, being descended from the second son of William Lord Cochran, who died in the lifetime of the first earl, claiming upon the revocation and deed executed by the last earl in 1725, but particularly upon his character of heir male to the said William Lord Cochran, the son of the first earl, who had died infeft in part of the lands, and whose succession had not been taken up by any person by service as heir to him; and claiming right to all the other lands by virtue of the settlements of 1680, 1684, and 1706.

Briefes

Briefs were take out for serving the marquis heir to the two last earls, but opposition being made by the present earl, both parties brought their actions of declarator before the Court of Session, for ascertaining their several claims to the estate. These causes being conjoined, and being fully argued before the Court of Session, their lordships, on the 16th of December 1725, " Found that by the bond of tailzie 1716 years, the daughters of the grantor are called to the succession in their order, before any heir male not descended of the grantor's body; and found that William Earl of Dundonald could not on death-bed, nor in his minority, though with consent of his curators, gratuitously make any alteration of the destination of succession contained in the said bond; and repelled the allegation that the alteration was onerous because of the mutual tailzie, and therefore sustained the bond 1716, though not registered in the register of tailzies as a title to the Marquis of Clydesdale to serve heir of provision; and found that neither the clause of return in the contract 1653 and 1656, or discharge 1657, nor the substitutions in the procuratory of resignation 1680, or contract of marriage 1684, did disable the last John Earl of Dundonald gratuitously to alter the succession by a deed in favour of his daughters, in prejudice of the heirs male of the former investiture :

This first part of the interlocutor appealed from by the Earl of Dundonald.

" But further found, that the procuratory of resignation 1680 years, and charter and sasine following thereupon in favour of William Lord Cochran, joined with the subsequent investment and possession of his heirs, did not effectually establish in the person of the last John Earl of Dundonald the property of the lands and estate, wherein William Lord Cochran, son to the first Earl of Dundonald, died last vest and seised by either public or base investments; and repelled the allegation of prescription, pleaded for the Marquis of Clydesdale; and also the allegation of not registration of William Lord Cochran's investments 1653, in the register of sasines of the shire of Renfrew, and that the investments 1653 and 1656 were not clothed with possession; and therefore found, that the lands and estate wherein William Lord Cochran died last vest and seised are yet *in hereditate jacente* of the said William Lord Cochran, and that the present Earl of Dundonald may serve heir to him therein: and found that the Earl of Dundonald, by so serving heir to the said William Lord Cochran, passing by Earl John, maker of the gratuitous bond of tailzie 1716, is not by the act of parliament 1695 obliged to fulfil the said bond of tailzie, and reduced, decerned, and declared accordingly."

This second part appealed from by the marquis.

Petitions were given in by both parties against this interlocutor, but the Court, on the 26th of January 1726, " adhered to their former interlocutor of the 16th of December last; and found that the lands and estate, wherein William Lord Cochran died vest and seised, to which no title was made up by his successors by service or precept of clare constat as heirs to him, or by disposition from him, are yet *in hereditate jacente* of the said William Lord Cochran and that the present Earl of Dundonald

Appealed from by both parties.

“ nald may serve heir to him in such of the said lands and estates  
 “ as are settled upon heirs male, and found that the Earl of Dun-  
 “ donald, by so serving heir to the said William Lord Cochran, and  
 “ passing by Earl John, maker of the gratuitous bond of tailzie  
 “ 1716, is not by the act of parliament 1695 obliged to fulfil the  
 “ said bond of tailzie, and remitted to the Lord Cullen,ordi-  
 “ nary, to apply this and the former interlocutor, as to the par-  
 “ ticular lands, wherein the said Lord Cochran died vest and  
 “ seised, and whereto a title was not established in the person of  
 “ any of his successors.”

Appealed  
from by the  
marquis.

And on a petition for the Earl of Dundonald, their lordships,  
 on the 28th of January 1726, “ repelled the allegation pleaded  
 “ for the Marquis of Clydesdale upon the bond of tailzie 1688,  
 “ as being liable to the same objections as the bond of tailzie  
 “ 1716, and altered by the contract of marriage 1706 years;  
 “ but superseded to determine what heir should be liable to the  
 “ debts, until the services be expedited, leaving the creditors to  
 “ pursue the representatives of their debtors as accords (a).”

Entered,  
21 Feb.  
1725-6.

The original appeal was brought by the Marquis of Clydesdale  
 from “ part of two interlocutors of the Lords of Session of the  
 “ 16th of December 1725, and 26th of January thereafter; and  
 “ from the whole interlocutor of the 28th of the same month.”

Entered,  
26 Feb.  
1725-6.

And the cross appeal by the Earl of Dundonald from “ other  
 “ parts of the said two interlocutors of the 16th of December and  
 “ 26th of January.”

*On the Original Appeal—Hends of the Argument of the Appellant  
 the Marquis.*

By the settlements made upon William Lord Cochran, by his  
 father the first Earl of Dundonald, it was optional to him to take  
 infeftments in these premises, as holding them either immedi-  
 ately of the crown, or of the grantor. William the son chose the  
 last, but he was at liberty any time afterwards to take new infeft-  
 ments, holding the lands immediately from the crown, and such  
 new infeftments would have rendered the former base infeftments  
 void and useless, and established a complete right in his person,  
 and those base infeftments could never have been taken up by any  
 of his after heirs. But William the son not having taken such  
 infeftments from the crown in his life, John his son and heir could  
 not do so upon the former procuratories, for those were void by  
 the death of the grantee. He had no way to supply this, but  
 either by compelling William the father by an action at law to  
 grant a new procuratory, or by William the father executing one  
 voluntarily. William the father chose this last method, and in  
 1680 made a settlement of the same premises to John the grand-  
 child, who had the only right by the first settlement, limited to the  
 same heirs, containing a procuratory of resignation; which last  
 procuratory was made use of, and a charter granted by the crown  
 thereon, and John the grandson was thereupon infeft; and upon

(a) *Vide* this reserved point, in *Kaimo*, January 1727, No. 73.



this title the estate has been ever since possessed, and the several descendants served heirs thereupon. It cannot be denied, but that if John the grandson had commenced an action against William the grandfather, and obliged him to grant a procuratory, it would have been good, and the charter from the crown well founded; and it seems to be a strange distinction to say such procuratory would have been good if he had been forced to do it by suit, but not good where he submitted to do it without suit.

The infestments of 1653 and 1656, in favour of William the son, never having been completed and made public by possession, and the infestment 1653 not recorded in the register of sasines for the shire of Renfrew, where a considerable part of the lands lie, the public infestment of 1680 in favour of John Lord Cochran is preferable, as being a complete deed attended with possession.

The conveyance of 1680 proceeds upon a recital of full powers reserved to William the father to dispose of the estate at pleasure; and as the powers might have been contained in distinct deeds, though they are now not to be found, the law at this distance of time presumes there were such deeds, and such deeds must have been subsisting at the time of the marriage settlement 1684, for they are then recited; and it cannot surely be imagined but that the counsel for the lady would see the Deeds there recited; and after so long a term as forty years, the law dispenses with not producing them; the rather, that these powers have been expressly acknowledged by John the grandson, the only person who could be by them prejudiced, and his acknowledgment is sufficient proof against all succeeding heirs.

This estate having now been possessed by virtue of the infestments 1680, and subsequent infestments following thereupon, there is a positive prescription established, which empowered the last Earl John, upon the footing of those titles, to dispose of the estate at pleasure; and likewise a negative prescription against the pretended separate settlement, as is clear by the act of parliament, 1617, c. 12. anent prescription of heritable rights.

By the act of parliament 1695, c. 24. any apparent heir passing by another heir, who had been three years in possession, is obliged to fulfil the deeds of the intermediate heir, whom he passes by, and therefore the respondent cannot make up titles to any lands which belonged to William the son, without passing by John Earl of Dundonald, grantor of the deed 1716, who was more than three years in possession, and therefore he must fulfil that deed in favour of the appellant.

*Argument of the Respondent, the Earl of Dundonald.*

Though an heir has it in his choice, whether he will serve to his ancestor or not, and during his life no remoter heir can quarrel his possession; yet if he does not serve heir, and thereby make up a lawful title to the estate that was in his ancestor, the next succeeding heir, after his decease, may, by the law of Scotland, serve heir to that ancestor, and will be thereby entitled to the estate, as if the preceding heir had never existed. And before the act

ad 1695, no debt nor deed, for whatever valuable consideration, of such person who did not serve heir, could have been effectual against the next successor, serving heir to the ancestor infest; and it is plain John Lord Cochran the grandson was sensible that unless he served heir to his father, he had not a lawful title to his estate; for by his marriage settlement 1684 (to which his grandfather was a party,) he covenanted to obtain himself infest as heir of his father, in the lands wherein his father died invested, without any reserved power to his grandfather.

Though, as the law then stood, the procuratories 1653 and 1656 in favour of William Lord Cochran, could not have been used after his death, but must have been renewed to his heir; yet the person to whom they were to be renewed, must first have been actually served heir, before he could have been entitled either to sue for, or even receive, a performance of Earl William's obligation to renew the said procuratories; but in this case the procuratory 1680, was so far from being a renewal of those of 1653 and 1656, that it does not only not mention them, but is in direct opposition to them; for by the procuratory 1680, the earl reserved a power in himself "to sell the estate, or charge it with debts;" whereas by the former procuratories the fee simple was absolutely vested in his son, without any power at all reserved to himself. But if the procuratories, 1653, and 1656, had been renewed to John Lord Cochran, as heir of his father, yet his father's base infestments would not have been thereby extinguished or consolidated, unless he had also been served heir specially to those base infestments of his father, and been infest himself thereon, or had taken the other method of being infest by precept of *clare constat*.

William Lord Cochran had possession two ways, first by the possession of his father, whose life-rent was reserved, and in the eye of the law the life-renter's possession is the possession of the *fiar*: secondly, William Lord Cochran was in actual possession, of part of the estate which was allotted to him for his maintenance, and which was all he could be in the actual possession of during his father's life; and in the next place, base infestments, though neither recorded nor followed with possession, are good against the grantor, and preferable to any subsequent infestment made without a valuable consideration, and in this case, the infestment 1680 was voluntary, and from the grantor of the prior base infestments to his heir apparent, who thereby became liable to make good the deeds of the grantor, and consequently those very deeds of 1653, and 1656.

It may be reasonably presumed, that the earl had forgot that he had by the deed 1657 discharged all the powers he had reserved by the deed 1653; but both the earl and his grandson soon afterwards, in effect, acknowledge that recital to have been a mistake, when by the deed 1684 the grandson becomes bound to make up his titles to the lands wherein his father had been infest; and in the clause of warrandice in that deed, the earl excepts the rights formerly granted by him to his son; both which had been

needless, had the earl had the reserved powers pretended; but the powers recited to have been reserved to the earl, can only be construed to be the power of felling or mortgaging the lands of Kirkmichael and Dalmuir, which the earl had reserved to himself, in the infeftments of those lands to his son.

Prescription can only run, for a title, under which there has been an uninterrupted possession of 40 years; or against a title, under which there hath been no claim for 40 years; but in this case, the persons who have been in possession for 40 years past, have had both rights, that is to say, the right of possession as heir male of William Lord Cochran, (an heir being legally entitled to possession, though he be not served heir,) and the right now claimed by the marquis under the infeftment 1680; and therefore, as the possession has been all along held by the same persons under both titles, no prescription can run for one title, against another title in the same person, at the same time. Besides, one of these titles is but lately descended to the present earl, who could not claim it during the life of any of the former earls, and it is a maxim in law, *contra non valentem agere non currit prescriptio*; and, if he had been *valens agere*, he was a minor.

The marquis contended, that by the act 1695, c. 24. a person who passes by his immediate ancestor, and serves heir to a remoter, is liable for the debts and deeds of the ancestor passed by, and therefore if the present earl served heir to William Lord Cochran, and passed by Earl John the first and second, he was obliged to perform their deeds; and, consequently, to perform the bonds of tailzie 1688, and 1716, which they made. But the title of this statute is "An act for obviating the frauds of apparent heirs:" and the preamble is, "considering the frequent frauds and disappointments that creditors suffer, through the contrivance of apparent heirs in their prejudice; and for remedy thereof, ordains," &c. Now though the words of the act are, debts and deeds in general, yet from the title, preamble, and whole tenor of the act, these must be construed to be, debts and deeds for a valuable consideration, but not deeds merely gratuitous.

*On the Cross Appeal.—Hends of the Argument of the Earl of Dundonald.*

Supposing Earl John the second had a power of altering the succession of the estate, yet he had not done it by the bond 1716, which recites, "that he had determined, failing heirs male of his own body, or heirs male of any of the descendants of his body, to settle the succession of the estate in one person, that the same might not be divided amongst heirs portioners, and therefore he obliged himself, and his heirs of line, and heirs male, failing heirs male as said is, to make surrender of all his lands contained in his infeftments thereof, for new infeftments to be granted to his eldest daughter, and the heirs male of her body," &c. And then he "appoints his three daughters, successively, to be heirs of tailzie and provision, to him and to  
" the

" the heirs male of his body, or heirs male of the descendants of his body, in the said lands, with power to them to take out " brieves and obtain themselves served heirs and infeft therein." Now it is plain, by the words of this bond, that the daughters of Earl John are not called to the succession, till failure of heirs male of the descendants of his body, which has not yet happened; for the present earl is the *heir male* of Earl William, who was descendant of the body of the said Earl John; and it is plain, that the intention of the bond is only to prevent the division of the estate among co-heiresses, which would never happen till failure of all the heirs male, to whom it was limited by the former settlements. And this is confirmed by the clause, which empowers the daughters to obtain themselves infeft by brieves and service, which method, by the law of Scotland, they could not pursue until failure of all the heirs male, who were preferred to them in the former infeftments. But the reason of Earl John's making this bond, was to supply a defect in his marriage-settlement 1706, which had not provided that, in case of the descent of the estate to heirs female, the eldest should succeed without division, as had been done in all the former settlements.

*Argument of the Respondent the Marquis.*

John Earl of Dundonald, the marquis's grandfather, had an undoubted right to limit the succession of the estate to his own right heirs; for though by several of the former settlements the limitations were to heirs male, yet these containing no prohibitory or irritant clauses, the said earl, or any other of his predecessors, had power to alter those settlements; and as this was done by John first Earl of Dundonald in anno 1688, so it was effectually done by the marquis's grandfather, by the said deed in 1716, whereby the estate, upon failure of issue male of Earl John's body, was limited to his eldest daughter and the heirs male of her body, and the marquis being the heir male of her body is well entitled to the said estate, and the same ought to be decreed to him.

A settlement made by any person upon his heir apparent, with several remainders over to other persons, and upon failure of them to return to him and his right heirs, is no more than a simple destination or nomination of several heirs, and upon failure of them to the grantor's right heirs, and consequently is no bar to any alienation or alteration by any of the remainder-men. Whatever effect a clause of return might have to the persons in whose favour the last limitation is made, or such clause of return conceived, it can operate nothing in favour of any of the intermediate heirs who are prior to the last limitation, the persons to whom the same is to return can only have the benefit of it, that is the marquis, who is the right heir of the said William Earl of Dundonald; and whatever benefit the clause of return can occasion will be in favour of him and him only. And since he does not complain of any prejudice, none of the intermediate heirs can take any benefit of that clause of return, especially since their claim is to defeat the very person in whose favour the clause was infefted.

inserted. Those deeds, 1653, 1656, and 1657, in which the clauses of return are inserted, are not the subsisting titles of the estate, they were varied and altered by the after-deed 1680, whereby the estate was settled by the first Earl William upon John Lord Cochran his grandchild, and the several persons therein named, without any clause of return.

It is the general rule, by the law of Scotland, that no settlement of this kind, where no prohibitory clause is added, will prevent any alteration in the order of succession, especially when the alteration is in favour of the right heir descending of that very marriage; nor is there any particular thing in this case that can set aside the general rule, and such settlement is only considered as done for valuable consideration, in so far as concerns the heirs of the marriage: but is entirely voluntary as to all other heirs; and William the father, by the deed 1684, releases all power he had over the estate; and John the grandchild reserves to himself an absolute power of alienation, and charging the premises with debts: so Earl John, the appellant's grandfather, by his marriage-articles, reserved a power of alteration, and has accordingly executed that by the deed 1716.

Earl John intending to limit the estate to his own daughters, in priority to his collateral heirs male executed the deed in 1716, whereby he obliges himself, his heirs male, of tailie, provision, &c. upon failure of heirs male of his own body, and the heirs male of the descendants of his own body, to surrender the estates in favour of the marquis's mother, and her sisters respectively in tail male, that is, in case there should be no issue male of Earl John's own body, nor heirs male of the body of any issue male of his body, in each case his daughters were to succeed in priority to his collateral heirs male, especially since he obliges his heirs male to make this surrender, which could not possibly have any effect in case he had it in view, as the present Earl of Dundonald pretends, that his heirs male, though not descended of his own body, were to succeed before his daughters; then the deed was of no use, nor could any heir male be compelled to have completed the title. By the deed 1716, in case of failure of issue male of the marquis's mother and her sisters, the next immediate remainder is to Earl John's heirs male, which shews plainly that he intended his daughters should take first, and that his heirs male were only to succeed upon failure of issue male of his daughters; and yet, by the earl's construction, the heirs male are to succeed before the daughters, and their right only to commence upon failure of the remotest heirs male of Earl John. When the estates are limited to the collateral heirs male, Earl John charged his estate with the payment of 16,000*l.* as the fortunes of his three daughters, and likewise charged it with 7000*l.* more, in case the estate should descend to any heirs male but those of his own body; but having varied the former limitations, and thereby settled his estate upon failure of issue male of his own body upon his daughters, he diminished their fortunes, and charged the estate only with 8000*l.* The marquis not only claims  
by

by virtue of the deed in 1716, but by the settlement 1688, whereby the estate is limited to the heirs female of Earl John the grandson upon failure of heirs male of his body; and the last Earl William dying without issue, the heirs male of Earl John failed, and the estate, by virtue of that limitation, descended to the marquis; as the eldest son of the eldest heir female of Earl John the grandfather.

There is no law requires any deed of entail, either to be completed by infestment, or recorded during the grantor's life; and this deed not being in favour of the Earl of Dundonald, he must, as the collateral heir male, be bound by the several covenants therein.

There was no valuable consideration granted by the Earl of Dundonald for the revocation executed by Earl William on deathbed; the present earl did entail his estate, failing heirs male of his own body, to the said earl and the heirs male of his body, a few days before he died, when it was obvious he could neither live to enjoy the estate, nor have heirs procreate of his body; and the deed 1716 being completed by the death of Earl William the infant, without any need of further delivery, the same became irrevocable; and the procuratory of resignation, granted by the last earl in 1722, being granted pursuant to the deed 1716, and completed by delivery, could not be revoked by him. All these deeds were not only granted while the said earl was on deathbed, but likewise while he was a minor; and no minor, even with consent of his guardians, can alter the former settlements of his estate, and more especially in this case, when the last earl, at the time of granting those deeds, was absolutely incapable by pressure of sickness, and the effects of a raging fever; and these deeds were only authorized by three guardians, two of whom had a very direct and manifest interest: for upon the failure of the respondent without male issue, the estate would descend to these two guardians, the father and son, in whose house the earl was then kept, and by whom those deeds were in a very extraordinary manner procured from him.

Judgment,  
22 April  
1726.

After hearing counsel, *It is ordered and adjudged, that as well the original appeal of the Marquis of Clydesdale, as the cross appeal of the Earl of Dundonald be dismissed; and that the several interdictors in the said appeals complained of be affirmed.*

For the Marquis of Clydesdale,

*P. Yorke. Dun. Forbes.  
Ro. Dundas.*

For the Earl of Dundonald,

*C. Talbot. J. Fergusson.*

Sir Alexander Cuming of Culter, Baronet,  
 Eldest Son, Executor, and Assignee of Sir  
 Alexander Cuming, deceased - - - *Appellant*;  
 James Ferguson Esq., of Pitfour - - - *Respondent*.

Case 130:

23d April 1726.

*South Sea Company.—Act 7 Geo. 1. St. 2.*—An heritable bond is granted in consideration of transferring a sum of South Sea stock, at the then next opening of the books; by a separate obligation the grantee was entitled to transfer, at said opening or any time thereafter, on three days advertisement; by an act of parliament all contracts for the sale of stock not performed by a certain day were to be registered, or otherwise void: The stock was not transferred at the opening; the bond was registered in due time, but not the separate obligation. In a reduction it is found relevant to reduce the bond, that the transfer was not made at the opening as specified in the bond, &c. and the defence on the separate agreement is repelled, it not being registered in terms of the act of parliament.

But at the bar the parties made an agreement that the bond should be good for part of the sum, and on their agreement the interlocutors are reversed, and the bond ordered to be effectual for that sum.

**A**BOUT the latter end of June 1720, an agreement was entered into at London, between the appellant's late father, and the respondent, for the sale of 500l. South Sea stock. On the 5th of July thereafter the respondent granted an heritable bond over his estates in Scotland, to the late Sir Alexander Cuming, the personal obligation of which was in the following terms:

“ Be it known to all men, me Mr. James Ferguson of Pitfour,  
 “ Forasmuch as Sir Alexander Cuming, Baronet, has of this  
 “ date granted an obligation, to transfer to me, my heirs, and  
 “ assigns the sum of 500l. original stock of the South Sea, at the  
 “ next opening of the Company's books, and that together with the  
 “ dividend of the said stock, upon my granting of these presents  
 “ for the price of the same; therefore I bind and oblige me,  
 “ my heirs, and successors, to content and pay to the said  
 “ Sir Alexander Cuming, his heirs, executors, administrators, or  
 “ assigns in London, on or before the 1st of March next ensuing  
 “ 5500l. sterling, as the consideration money, or price of the said  
 “ stock, at the rate of 1100l. for each hundred of stock; together  
 “ with 1000l. of penalty in case of failure, and annual-rent of  
 “ the said principal sum during the not payment after the said  
 “ term of payment.”

Of the same date, the respondent received from Sir Alexander Cuming a note or obligation in the following terms:

“ I Sir Alexander Cuming, Baronet, oblige me, my heirs,  
 “ executors, and administrators, to transfer to Mr. James Ferguson,  
 “ his heirs, or assigns, 500l. sterling of original South Sea  
 “ stock, and that at the next opening of the Company's books  
 “ or any time thereafter, on three days advertisement, having received

" the value of him by bond of this date, and I hereby declare that he is entitled to the dividend on this stock."

The respondent soon after went to Holland, from whence he wrote sundry letters to the appellant's father, which were founded on in the action that arose between the parties. In a letter dated the 26th of July 1720, the respondent writes that he intended to be in London by the opening of the books, and says, " if you can sell me 500*l.* or 1000*l.* on the same terms you did the last, I will be your merchant." In another letter dated the 27th of August, the respondent writes, " I took a premium of 20 per cent. on your stock to give the refusal of it at 1500*l.* I wish it be required." By a letter of the 6th of September, he informed Sir Alexander that he was far from repenting of his bargain, and though he was upbraided by letters from Scotland for the bargain he had made, yet he was sure he would never complain of Sir Alexander. And on the 24th of September, when stocks were sinking, the respondent wrote that he still continued to have so good an opinion of them, that he wished that all the money he had, or could command, were drowned in the South Sea at the then current price.

Sir Alexander Cuming did not transfer to the respondent the 500*l.* stock with the dividend at the opening of the South Sea books, on the 22d of August 1720. And stock having declined rapidly in value, by the time the respondent returned to London, he refused to accept the transfer, or to pay Sir Alexander the sum contained in his bond.

Sir Alexander thereupon brought an action of mails and duties before the Court of Session, against the tenants of the respondent's estate over which he had granted security; and also an action against the respondent himself, for payment of the sum contained in the bond with interest. The respondent brought a counter action for reduction of the said bond; and upon his petition the Court stayed proceedings upon the actions at Sir Alexander's instance, till the action of reduction was disposed of.

When this action came to be heard, the respondent insisted, that the said heritable security having been granted in consideration of the obligation to transfer to the respondent 500*l.* stock with the dividend at the opening, but this consideration not having been performed, the bond was void. He founded also upon two clauses in the act of 7 Geo. 1. stat. 2. which enact, that every contract for the sale or purchase of South Sea stock, unperformed, or not compounded by the parties, on or before the 29th of September 1721, and a memorial of which was not registered, as therein mentioned, before the 1st of November 1721, should be void; and that such contract should also be void, if the seller were not at the time of such contract, or within six days after, actually possessed of or entitled in his own right, to the stock so sold by him. Upon these clauses, the respondent contended, that the contract in question being unperformed and not compounded, the appellant should shew that it was registered, and that he was possessed of stock in terms of the act.

The



The appellant stated in answer to this, that the consideration of granting the bond, was the obligation from the appellant to transfer stock at the opening, or at any time after, on three days advertisement; and that this alteration did not allow him to transfer at the opening of the books when the respondent was in Holland; that the transaction could not be said to be unperformed, but was completed by granting the bond and obligation; and, therefore, that it was not necessary that the contract should have been registered, or that the appellant should shew he was possessed of stock in terms thereof. He stated, however, that he had registered the bond granted by the respondent within the time limited by the act; but that the obligation granted by himself was not registered, having been out of his custody. The Lord Ordinary on the 17th of November 1722, ordered the appellants' father to give in a particular condescendence, in terms of the act of parliament of the stock he was possessed of, or entitled to at the time of the contract between the parties; and the Court on the 7th day of November thereafter adhered to the Lord Ordinary's interlocutor. The late Sir Alexander, accordingly gave in a condescendence, which satisfied the Court upon that point.

After various further proceedings, the Court on the 15th of December 1724, "found the reasons of reduction relevant and proved, that Sir Alexander Cuming did not perform in terms of the said bond; and repelled the defence made upon the alternative clause or condition of the obligation, granted by Sir Alexander Cuming, in regard the said obligation, (though a part of the contract) was not registered nor any abstract or memorial thereof entered in terms of the act of parliament 7mo. Georgij Regis." Sir Alexander having reclaimed, after answers for the respondent, the Court on the 9th of January 1725; "found the reason of reduction relevant and proved, that Sir Alexander Cuming did not perform in terms of the obligation as recited in the bond, by transferring or tendering a transfer at the opening of the books; and found that the writs constituting this bargain of sale, or an abstract or memorial thereof, ought to have been registered, conform to the act of parliament 7mo Georgii, and found that the registration of the bond, (which did not contain the alternative clause mentioned in the separate obligation,) was not a sufficient registration of the contract, and therefore repelled the defence founded on the said alternative clause, and adhered to their former interlocutor, and refused the desire of the petition."

The late Sir Alexander Cuming died on the 5th of February 1725, having previously assigned to the appellant the said heritable bond, and all interest due thereon.

The appeal was brought from "an interlocutor of the Lords of Session of the 15th of December 1724, and the affirmance thereof the 9th of January following."

Entered,  
3 Feb.  
1725-6.

*Heads of the Appellant's Argument.*

Sir Alexander, from the obligation given by him, could not have sold out the stock in order to insist on the difference, because if stock had risen, the respondent would not have been bound by such transfer, but he might have called for that 500*l.* stock to be transferred to him, at any time afterwards, upon three days' notice: besides the respondent knew very well, that the stock was not transferred at the opening of the books, and he was so far from complaining of that neglect, that he wrote after that time to the appellant's father, that he was desirous to be a purchaser of more South Sea stock.

The act 7th George has no reference to the present question; the contract for the sale of stock was performed, the appellant's father having given the respondent a note for transferring the stock, and the respondent having given an heritable bond for so much money, which was taken as payment for the stock.

But, for greater caution, the appellant's father did actually sign and register an exact copy of the said bond, agreeably to the directions of the said act. There was no occasion for the appellant's father to register the note given by him to the respondent; it was in the hands of the respondent, who might have registered it, if he thought fit; besides, the bond which is registered, requires the note, and ought to be considered as equivalent to the registering of the note itself.

If the alternative in the note varied the original bargain, that was in favour of the respondent, giving him a larger interest, and putting him under no necessity to attend the transfer at the opening, and obliging the appellant's father to be answerable for the stock whenever he should think fit to call for it: the registering of the note therefore, if it had been necessary, lay upon the respondent, but the appellant does not lay hold of this note to create any obligation upon the respondent; he only uses it to prove a matter of fact necessary to be cleared. No one can doubt, but the respondent's consent to the not transferring or tendering the stock at the opening, proved by letters or otherwise, would be a proper answer to any objection, that the stock was not transferred or tendered; and yet it will hardly be supposed that such letters, or a memorial of such evidence ought to have been registered.

*Heads of the Respondent's Argument.*

No evidence can be given of any contract or agreement not registered. It appears upon the face of the bond granted by the respondent, which was registered by Sir Alexander Cuming, that Sir Alexander was to transfer to the respondent 500*l.* stock at the then next opening of the books; *in consideration whereof*, the respondent granted his bond for the price payable on the 1st of March following. This was clearly a contract for the sale of stock unperformed, in the proper sense of the act. And Sir

Alexander neither transferred the stock, in terms of the contract recited in the bond, which he might have done, though the respondent was not present; nor did he register any other agreement.

Though the respondent had in his custody, the obligation granted by Sir Alexander, yet he must be supposed to have known what was the tenor of that obligation, and might have registered a memorial of it if he had thought fit; as he neglected this the respondent can have no advantage from this obligation.

Counsel being called in to be heard upon this appeal, "Mr. Attorney General, on the part of the appellant, having first stated the nature of the case, did then acquaint the house, that the said parties were come to an agreement, and that the same was put in writing, which if their lordships pleased they desired might be confirmed; and Mr. Solicitor General likewise acquainting the house, that the respondent did consent to the said written agreement.

"And the same was thereupon signed by both parties at the bar; and it being then read and delivered in, the counsel were directed to withdraw; and being withdrawn, and consideration had in relation to this matter,"

It is ordered and adjudged, according to the said written agreement, *judgment,* that the interlocutors complained of be reversed, and that the bond and investment in question be restricted to 1000l. sterling to be paid at Christmas next with interest from this day; and that upon such payment and delivering up the note or obligation for transferring the 500l. South Sea stock, with the Midsummer dividend, the appellant do deliver up to the respondent, the said bond and sasine, and grant or procure to be granted a valid renunciation and discharge thereof with all that followed thereupon; but in default of payment of the said 1000l. and interest as aforesaid, the appellant be at liberty to take out execution upon the said bond for the said restricted sum of 1000l. and no more, except such costs and charges as may be occasioned thereby.

For Appellant, P. Yorke. Dun. Forbet.  
For Respondent, C. Talbot.

Case 131. Sir Alexander Cuming, Baronet, eldest Son  
and Executor of Sir Alexander Cuming,  
Baronet, deceased - - - *Appellant;*  
Robert Pantoun, late of Rotterdam, but  
now of London, Merchant - - - *Respondent.*

28th April 1726.

*Lis Alibi pendens.*—A defence of *lis alibi pendens* is repelled, where the pursuer produced an order of the Court of Chancery, dismissing a suit which he had instituted upon same grounds with his action in the Court of Session, and a declaration under his hand disclaiming all further proceedings in that suit.

*Process.*—In a process relative to the advance of a sum of money, the pursuer set forth the tenor of an obligation granted by himself to the defender's father for a *depositum* made by the latter, and certain letters as in the defender's hands: in terms of the act of *federunt*, the defender is held as confessed on the tenor libelled, as he neither confessed nor denied the same, and decrees given against him thereon.

*Usury.*—In a loan of money to be repaid by drawing and re-drawing on a foreign merchant, the borrower agreed to pay the exchange and re-exchange: though this by the course of exchange amounted to more than legal interest, it was not usury.

*Annual rent.*—A loan agreed to be repaid by a certain day, bore interest after that day, though no interest was stipulated for: exchange and re-exchange, which the borrower agreed to pay, also bore interest from the day of payment: in a decree for payment of a certain sum, part of this is distinguished as principal bearing interest, and part as interest only.

*Depositum.*—The depositary of a South Sea subscription, was warranted in paying money, and accepting stock, as the principal must have done in terms of an act of parliament.

*Costs.*—An affirmation with 50*l.* costs. Proceedings relative to these costs, and mode of recovering the same pointed out by the house.

THE respondent in the year 1723, brought an action before the Court of Session against the appellant's late father, therein setting forth; that the respondent having from time to time supplied Sir Alexander Cuming with money, while he was conservator at Campvere, in June 1720, there was due to the respondent 1075*l.* sterling on a balance of accounts; that the respondent being then in London, was, on the 15th of June 1720, applied to for a loan of 2000*l.* more; but not having money sufficient in his own hands, he prevailed with a Mr. Henry Cairns, Merchant, in London, to advance Sir Alexander 3000*l.* of which he applied 2000*l.* to his own use, and paid 1000*l.* to the respondent towards the discharge of the said balance of 1075*l.*; and Sir Alexander having also granted to the respondent three notes of 25*l.* each for the remaining 75*l.*, the respondent released him of the balance of the old account:

That it was then agreed that Cairns should, to reimburse himself, draw bills upon the respondent, for the 3000*l.* payable in Amsterdam, at two months usance, and the respondent was to redraw upon Cairns also at two month's usance; and the respondent's bills thereby falling due on the 5th of October, Sir Alexander was to

pay the money to Cairns on or before the 4th of October; and Sir Alexander deposited in the respondent's hands in further security 1000*l*. South Sea first subscription, (a) whereon 900*l*. had been paid to the company for the first and second payments: and that the respondent thereupon granted to Sir Alexander a note or obligation, under his hand, to which the appellant was a subscribing witness, in the following terms: "I Robert Pantoun, Merchant in Rotterdam, acknowledge me to have received from Sir Alexander Cuming, Baronet, a receipt for the first and second payment of 1000*l*. sterling, first subscription in the South Sea Company, marked No. 1302, which I oblige me to return to the said Sir Alexander, upon his payment to me of the sum of 3000*l*. advanced by me to him as the value of bills, drawn by Mr. Henry Cairns upon me, payable at Amsterdam, viz. 2000*l*. by bills drawn the 17th of June instant, and for 1000*l*. drawn this day, as also upon payment of the equal half of the loss of exchange, &c. in drawing and re-drawing, it being agreed that the profit and loss of the draught and re-draught shall be equal between Sir Alexander and myself; and it is further agreed, that the said Sir Alexander Cuming shall repay the said sum of 3000*l*. betwixt this and the 4th of October next to the abovesaid Mr. Henry Cairns: as witness my hand in London, 21<sup>st</sup> June 1720. Robert Pantoun." Witness Alexander Cuming."

That the respondent same day, put the said subscription into the hands of Mr Cairns with a note in the following terms: "Mr. Henry Cairns, the above is a copy of my obligation to Sir Alexander Cuming, which you are to receive back discharged, when he repays to you the 3000*l*. with the re-exchange and commission, &c. wherein I entreat you will be very exact. The first subscription of 1000*l*. left in your hands is marked No. 1302, to be given to Sir Alexander Cuming upon his paying the money as above."

That Sir Alexander Cuming having offered to employ some part of the money lent him, in the purchase of South Sea third subscription, and of East India stock, for the joint behalf of himself and the respondent, it was therefore agreed, that if any loss should happen by drawing and re-drawing it was to be equally borne between them; but no stock having been purchased, the respondent wrote to Sir Alexander, from Rotterdam, on the 19th of July 1720, in the following terms, "I wrote you on the 9th current upon my arrival here; since, I have not any from you, wherewith I admire, and my nephew arriving here, tells me that you have bought no East India stock for our joint account, howbeit I expected otherwise; I send you therefore by my nephew a new obligation from me obliging me to make good to you the whole profit that may happen upon the re-draught of the 3000*l*. on Mr. Cairns, and you to pay whatever loss and the other charges that may come thereon; seeing as you have given me no interest with you, so I pretend none of the profit,

(a) This first subscription was taken by the South Sea Company at 300*l*. per cent.

“ and you know I ought to pay none of the loss, and upon exchanging I have ordered him to send me the obligation he is to receive from you. Pray give my nephew 75*l.* for the three notes you gave me, seeing he at present wants ready money ; yes, I promise myself, that you will be assistant to him :” And the respondent received a letter from Sir Alexander, bearing date the said 19th of July, in the following terms : “ I was favoured with your’s the other day ; for my part for all I borrowed, I was not able to purchase any East India stock, nor hardly to make up my subscription money, which I am even docked of, and cut off from some that I had assurance of from directors ; all that I could procure for you was 20 shares of the *poppy oil patent* :”

That the respondent wrote again to Sir Alexander on the 30th of July, in similar terms with his former letter, and requesting that the 20 shares in the poppy oil patent should be delivered to the respondent’s nephew ; and he received an answer from Sir Alexander, dated the 15th of August in the following terms, “ I complied with every thing you desired in relation to your nephew and have delivered him the 20 shares of the oil patent of my own stock, and I hope they will turn to good advantage ; it is very well we did not deal in India stock, as it has happened, and indeed all stocks seem to decline, but I believe it will not be long so ; as for your obligation which is done on stamped paper according to form, there will be no need of renewing it : I know you will take care that there be as little loss in re-drawing as possible, and to advise me which will be the best way to save myself, for I do not propose that you should pay any part of it, seeing you did not use any of the money for paying Sir John Lambert for our joint uses as was at first proposed : such a trifle of re-drawing will never break squares betwixt you and me, nor will I desire you to pay any part of it :”

That the respondent paid Mr. Cairns’s bills when they fall due, but by reason of the fall of exchange when the respondent came to re-draw upon Mr. Cairns, there was lost by the exchange 287*l.* 7*s.* 5*d.* : on the 16th of August, the date of Sir Alexander’s last letter, the respondent drew bills at Rotterdam, upon Mr. Cairns, at two usances, for 3200*l.* and for the remaining 87*l.* 7*s.* 5*d.* he drew on the 17th of September following :

That the respondent received a letter from Mr. Cairns, bearing date the 30th of August 1720, in the following terms, “ I communicated to Sir Alexander your draughts of 3200*l.* upon me for his account which he assured me positively that he will pay punctually to me against the 4th of October next, conform to his obligation. Please to take notice that I have now paid the South Sea Company 300*l.* for the third payment of Sir Alexander Cuming’s first subscription left in my hands ; for as he told your nephew and myself, he could not do it at present being short of money. I proposed to have drawn on you this day for the said 300*l.* but that the exchange got up to your place ; however I will do it soon :” And the respondent on the

17th of September wrote to Sir Alexander as follows: "I had your's very acceptable of the 16th past. I find by the fall of the stocks, and particularly that of the East India Company, that you conclude it best, that we had no concern, half in company therein, and that thereby none of your money was employed on that account, and so I am nowise liable to any share of the damages upon the bills re-drawn upon Mr. Cairns. Here-with I send you an exact account of the 3000*l.* that Mr. Henry Cairns drew upon me, for your account and accommodation, amounting to 33,649 guilders, 4 stivers, as also an account of the bills I have drawn on him for re-imbursment of the same, being 3287*l.* 7*s.* 5*d.* or 33,649 guilders, 4 stivers, which I assure myself you will punctually pay; for you will find that I have not charged one penny for my pains in this matter, yea not so much as for post of letters I paid; wherefore pray fail not, upon receipt hereof, to pay the above 3287*l.* 7*s.* 5*d.* timeously to Mr. Henry Cairns for discharging my aforesaid bills, as also the 300*l.* that he paid to the South Sea Company for your account; for all this must be certainly done, either by selling the 1000*l.* first subscription that lies in his hands, or by impignoring the same in another's hands, and so pay the money early to him for punctually discharging all the above bills. I am sorry your loss in the re-draught runs so high, yet I can assure you that all was done in the easiest manner possible; yea by this you will see what unavoidable loss I had, when I was necessitated to draw and redraw for the money I lent you; and to conclude this matter, pray let nothing hinder your punctually paying all the above, by which you know I have not one penny profit, and did it alone for your accommodation, and at your entreaty."

That Sir Alexander never answered this letter, and notwithstanding repeated promises to Mr. Cairns and to the respondent's nephew, he did not pay the money to Cairns on the 4th of October, to his utter ruin; for the bills were returned upon the respondent under protest, who paid the same with re-exchange in Holland amounting to 3645*l.* 1*s.* which added to the 300*l.* for the third payment on the said 1000*l.* South Sea subscription, and another 300*l.* for the fourth payment on the same also disbursed by the respondent, made the aggregate sum due by Sir Alexander amount to 4065*l.* 1*s.* :

That the respondent, having come to England, in July 1721, filed his bill in Chancery against Sir Alexander, who stood in contempt to a sequestration, and would not put in his answer, but went and resided in Scotland; whereby the respondent was obliged to commence the present action against him, to compel payment of the said 4065*l.* 1*s.* and interest since the first of November 1720, and he founded upon his note granted to Sir Alexander on the 21st of June 1720, and his letter to Sir Alexander of the 19th of July thereafter, as in the hands of the defender.

To this libel Sir Alexander Cuming put in the following defences, "1st, That there is a *lis alibi pendens*, by a suit in Chancery  
"depending,

"depending, at the pursuer's instance, against the defender, upon the very same grounds libelled. 2d, That the libel, in manner and form as it is set forth by the pursuer, is neither relevant; nor, 3d, is it true."

Akt of federunt, 16th Feb. 1723.

At a hearing before the Lord Ordinary, it was contended for the respondent, that in terms of the akt of federunt 16th February 1723, Sir Alexander should produce the obligation and letter from the respondent libelled on, or confess or deny the tenor thereof; and if he refused to do so, that he should be held as confessed as to the tenor. His lordship, on the 25th day of June 1724, pronounced this interlocutor: "In regard that the libel recites the obligation and missive letter written by the pursuer to the defender, as of a special tenor particularly libelled, and that it bears these writs to be in the defender's own hands, and that the defender in his defences returned with the process has neither particularly acknowledged nor denied the said writs to be of the tenor libelled, nor his having them in his hands as the akt of federunt directs; therefore held the defender confessed upon the tenor as libelled, and that the said writs are still extant in his own hands; and ordained parties procurators to debate in the cause, according as if the said writs of the tenor libelled were produced."

The next day, 26th, a minute was made in the cause, stating that the defender's counsel had consented and undertaken that if the Lord Ordinary would allow them a few days to send to their client, they would either produce the said writings or admit them to be of the tenor libelled; the Lord Ordinary, of same date, allowed the defender's procurators to produce the writs above-mentioned, betwixt and the 2d day of July next with certification." At next calling, however, the defender's counsel craved further time, stating that they were yet without instructions; but the Lord Ordinary, on the 4th of July, admitted the declaration and missive by the pursuer to the defender to be of the tenor libelled; and found the libel relevant and proven, and decerned in the terms thereof accordingly."

Sir Alexander's counsel gave in a representation against this interlocutor, stating, amongst other things, that the defence of *lis alibi pendens* had been overlooked; and the Lord Ordinary, on the 14th of July, "refused the desire of the said representation, except as to the defence of *lis alibi pendens*, as to which, ordained the other party to see and answer the same." In answer, the respondent produced an order of the Court of Chancery dismissing his bill; and by a declaration under his hand, he disclaimed all further proceeding in that suit. The Lord Ordinary thereupon, on the 16th of July, "repelled the defence of *lis alibi pendens*."

The appellants father thereupon presented a reclaiming petition to the Court, stating, amongst other things, that the minutes of debate were unduly drawn up, which bore that the defender's counsel had undertaken, in case the Lord Ordinary would give them a few days



days to send to their client, they would either produce the writings or admit them to be of the tenor libelled; whereas in fact they neither had made, nor had authority to make such undertaking. After answers for the respondent, the Court, on the 25th of July 1724, "Found that Sir Alexander was obliged to produce the above declaration, or to have set forth the tenor thereof in his answer, and adhered to the Lord Ordinary's interlocutor, holding him as confessed upon the tenor thereof as libelled; and in regard he had so delayed to produce the same, found him liable to pay to the pursuer, before he could be heard upon the principal, when produced, 50*l.* sterling, in name of damages and expences."

Sir Alexander next contended, that even according to the respondent's own shewing, he ought only to have been charged with interest on 3000*l.*, and that the drawing and redrawing was a fiction to evade the law of usury. After answers, and a debate upon this point, the Court, on the 3d of December 1724, "Found that the declaration and obligation libelled upon by Mr. Pantoun, the pursuer, and accepted of by Sir Alexander Cuming, the defender, did import a personal obligation on Sir Alexander to pay the sums therein contained; as also repelled the defences founded upon the usury."

Upon the respondent's application to the Lord Ordinary to apply this interlocutor, Sir Alexander insisted upon this new defence, that the respondent, before obtaining any decree, ought to restore the *depositum* in the same state and condition he got it. The respondent answered, that in pursuance of a subsequent act of parliament he had lodged the subscription receipt with the South Sea Company, of which he produced certificate, and had also paid 600*l.* to the company for the 3d and 4th payments; for which he also craved a decree. The Court, on the 9th of December 1724, "Repelled the new defence in respect of the answer, and ordained the pursuer to give in an account of his additional demands for advances made by him upon the said subscription, and the defender to give in written objections thereto."

Sir Alexander again petitioned the Court, stating, amongst other things, that the respondent was indebted to him for conservator fees, received by the respondent, and prayed that the respondent might upon oath confess or deny the facts therein stated. The respondent in answer set forth, that the alleged facts were all prior in date to the transactions now in question, and he produced a discharge executed by Sir Alexander, witnessed by the appellant, bearing date the 20th of June 1720, whereby Sir Alexander discharged the respondent of "all bonds, debts, accounts, and sums of money, due by him," preceding that date. The Court, on the 31st of December 1724, "Found that what was demanded in the above petition was unnecessary." And by another interlocutor, on the 1st of January 1725, they "adhered to their former interlocutor in presence, of the date the 2d day of December last, and also to the Lord Ordinary's interlocutor

“locutor concerning redelivery of the foresaid subscription, and  
“refused the desire of the bills.”

The respondent having given in an account of his additional demand, and craved the Lord Ordinary to decern for the same, Sir Alexander contended, that there could be no decree, 1st, because the respondent had intromitted with Sir Alexander’s fees as conservator: 2d, That there could be no interest due upon the 300*l.*, because none was agreed for: and, 3d, Because there was no deduction for the dividends received upon the subscription. The respondent answered, that the 1st was *res judicata*; 2d, that interest was due as much as the principal, the money being paid through Sir Alexander’s fault; and, 3d, that he would reform the account and give credit for the dividends. The Lord Ordinary, on the 9th of January 1725, “repelled the two first allegations in respect of the answers; and, as to the third, ordained  
“the pursuer to reform the account, and to give credit to the  
“defender for the respective dividends recovered from, or allowed  
“by the South-Sea company, on the foresaid subscription, and the  
“defender’s counsel to see the said account when reformed, and  
“be ready to object thereto.”

The respondent thereupon reformed his account, and after giving Sir Alexander credit for the dividends, and for the additional stocks and annuities granted to the holders of South Sea stock by act of parliament, to Christmas 1724, (though some were not received), he stated a balance due to him of 4712*l.* 10*s.* 5*d.* for principal and interest. Sir Alexander objected, first, that the respondent ought not to be allowed the fourth payment of 300*l.* upon the subscription, because that payment was not necessary; and, 2dly, that the respondent had reckoned interest not only for the principal sums, but for the exchange and re-exchange, and for the said 300*l.*, which he ought not to have done. This matter being debated before the Lord Ordinary, his lordship, on the 19th of January 1725, “Repelled the objection made against  
“the article of the fourth payment, made by the pursuer to the  
“South Sea Company, upon the subscription deposited in his  
“hands, and sustained the said article, and adhered to his former  
“interlocutor as to the annual rents; and found annual rents  
“due for the exchange and re-exchange, as well as for the principal  
“sums, and also for the two moieties paid by the pursuer  
“to the South Sea Company upon the said subscription; and  
“having considered the reformed account given in for the pursuer, approved of the same, and found that after allowance  
“therein given to the defender of all the dividends issued by the  
“company upon the said subscription, and received by the pursuer, and also of the last Christmas dividend, though not received by him, there remained due to the pursuer, of principal  
“and interest, upon the 1st of January current, the sum of  
“4712*l.* 10*s.* 5*d.* sterling money, whereof 4065*l.* 1*s.* being the  
“amount of the sums paid out by the pursuer is a principal sum  
“bearing interest; and, therefore, decerned for the said sum of  
“4712*l.* 10*s.* 5*d.* sterling, and for the annual rent of the said  
“principal

" principal sum of 4065. 1s. from and since the 1st of January  
 " current, and in time coming during the not-payment, and or-  
 " dained the pursuer upon payment, to transfer, in favour of  
 " the defender, the stock and annuities, which came in place of  
 " the subscription, with all the dividends, which should arise  
 " thereupon from Christmas last."

The appellant's father reclaimed, again complaining of the minutes, as to his counsel's concession to produce the respondent's note or letter, or to admit the tenor as libelled, and insisting upon several other points before determined. After answers, and a hearing upon this petition, the Court, on the 5th of February 1725, " Found that none of the interlocutors pronounced were  
 " founded upon the controverted concession by Sir Alexander's  
 " counsel, and alleged to be wrongfully placed in the minutes,  
 " and therefore refused the desire of the bill, craving the minutes  
 " to be rectified, and likewise as to the other points thereof."

The appeal was brought by the appellant, as eldest son and executor of his late father, from " several interlocutors of the  
 " Lords of Session of the 25th and 26th of June, the 4th and  
 " 25th of July, and the 3d and 9th of December 1724, the 1st,  
 " 9th, and 19th of January, and 5th of February following."

Entered,  
 3 Feb.  
 1725-6.

(The abstract of the argument used by the parties is contained in the preceding statement of the proceedings in the cause.)

After hearing counsel, *It is ordered and adjudged, that the  
 petition and appeal be dismissed, and that the several interlocutors  
 therein complained of be affirmed: and it is further ordered that the  
 appellant do pay or cause to be paid to the respondent the sum of 56l.  
 for his costs in respect of the said appeal.*

Judgment,  
 28 April  
 1726.

For Appellant, *John Willes. Wi. Wynne.*  
 For Respondent, *Ro. Dundas. C. Talbot.*

On the 16th of May 1726 a petition of the respondent was presented to the House of Lords, stating that the appellant had been served with a copy of the judgment, but refused to pay the 50l., and therefore praying for " such relief as to their lordships should seem meet." And thereupon George Pantoun was called in and examined upon oath, touching the allegations of the said petition, and having acknowledged that he had no letter of attorney, or other power from the petitioner for demanding the money; and being withdrawn: " It is ordered that the said petition be re-  
 " jected."

Journal,  
 16 May  
 1726.

On the 23d of the same month of May another petition was presented to the House of Lords, stating that he had empowered George Pantoun of London, Gentleman, by letter of attorney, to demand and receive payment of the 50l. costs, but that Sir Alexander refused to pay the same; and praying that the House would grant the petitioner such relief as to their lordships should seem meet: and thereupon the said George Pantoun being called in, and examined upon oath touching the allegations of the said petition: " It is ordered, that the said Sir Alexander Cuming  
 " shall

23d May.

" shall pay or cause to be paid to the respondent the said sum of  
 " 50*l.* costs within ten days; and if he shall fail therein, that  
 " then his recognizance to his majesty in the sum of 100*l.* for  
 " payment of such costs as the House should appoint, in case the  
 " several interlocutors from which he appealed should be af-  
 " firmed, shall be estreated into his majesty's Court of Exche-  
 " quer, in order to have the same speedily put in process  
 " there."

Case 132. Mr. Walter Stirling, Writer in Edinburgh *Appellant*;  
*Edgar*,  
 1 Jan. 1725. William Gray, of Inverighty - - *Respondent*.  
*Ex parte (a).*

13th Feb. 1726-7.

*Penal Irritancy.—Homologation.*—A collector of taxes, during Cromwell's usurpation, enters into an agreement with a person who had a commission to sue, compound, transact, and agree on the part of the Crown: to this commissioner the collector granted bonds for certain sums, and the commissioner obliged himself to deliver to the collector, *by a day certain*, a release from the Crown, otherwise the parties to remain as they were before the bonds were granted: it is found that this is no penal irritancy, and not to be purged after elapsing of that day.

A payment by the collector, after the elapsing of that day, was no homologation, or passing from the resolute clause.

*Prescription.*—Though 40 years elapsed after this alleged homologation, and no declarator brought on this resolute clause, it was still competent to plead it.

*Appeal.*—*g*l.** costs given against the appellant, who deserted his appeal.

**U**NDER the Commonwealth, and during Cromwell's usurpation, William Gray of Haystoun, the respondent's ancestor, was employed as collector of the taxations and other public impositions in the shire of Forfar. After the Restoration, in 1662, an act of indemnity and oblivion was passed in Scotland, but with a great many exceptions; one of which related to the accounts of persons who had intromitted with or received any part of the public money from the year 1639 to the year 1660.

In 1670, the then Earl of Dumfermling obtained a grant or commission from the Crown, under the privy seal, empowering him to call to an account, in proper processes before all or any of his majesty's courts, all intromitters with public money during the years abovementioned, and to recover all public monies in their hands unaccounted for. The commission contained a power to the earl of granting discharges or acquittances upon payment, and of transacting and compounding; and a clause, obliging the earl and his heirs to account to the Crown for his receipts.

(a) This statement is taken from the respondent's case only, the appellant not having appeared at the hearing, and, I presume, having presented no case.

The

The mode of proceeding with some of these debtors was to give them a charge of horning, and afterwards by compounding privately with them for such sums as they could afford; the earl, at same time, promising to procure them pardons and acquittances from his credit at court. Amongst others, the said William Gray of Haystoun was served with a charge of horning for a very large sum in 1670; but on the 10th of September that year, an agreement was entered into between the earl and him, in pursuance of which Mr. Gray paid to the earl 2000 merks in cash, and delivered up to his lordship a security from the Earl of Crawford for 14,000 merks; and he as principal, and his son William Gray of Inverieghty as cautioner, also executed and delivered to the earl four bonds, blank in the creditor's name, two for 3000 merks, and other two for 4000 merks each; being in all 30,000 merks.

The earl, of same date, executed a release of Haystoun's intromissions, under the powers his lordship then had; and the earl also then executed a back bond obliging himself to procure under his majesty's hand a ratification of the said discharge, with a remission or pardon, *and to deliver the same ratification and pardon to Haystoun between and the 10th day of November following, to the effect he might expedite the same: or otherwise if the earl failed in procuring thereof, he bound and obliged himself to pay back to Haystoun the sums received, with the security granted by the Earl of Crawford, so that if he should not procure the said ratification and remission, he and the said Haystoun were each of them to be in their own places, as if there had been no agreement.*

The earl having assigned two of these bonds to Sir William Sharp, he in 1671 brought legal distrefs against Haystoun for payment of one of them, which then became due, and which in consequence thereof Haystoun paid. No ratification of the earl's discharge, or remission by the Crown, had been granted in the mean time, nor were any such granted during the earl's life; and no farther demand was made on the other three bonds, during the lives of the earl and Haystoun.

The earl's assignee, the appellant, afterwards brought an action before the Court of Session against William Gray of Inverieghty, the respondent's father, the cautioner in the said bonds, and upon his decease against the respondent himself. The respondent pleaded in defence, that the bonds were become void upon non-performance of the quality in the back bond to procure and deliver the ratification on or before the 10th of November 1670. The appellant answered, that this was a penal irritancy, purgeable at any time, and which was actually purged by the son of the said earl, who had procured a ratification and remission some time after; and, further, that Haystoun, by paying up one of the bonds in 1671, after the irritancy was incurred, had homologated the bargain, and dispensed with the irritancy, which the respondent could not therefore insist upon.

The

The Court on the 1st of January 1725, "Found that the resolute clause in the back bond, is no penal irritancy, and therefore not purgeable upon performance after elapsing of the day ; and found that the payment made, after the said day was not a passing from the resolute clause ; but that Haystoun could at any time after the said payment insist to be reponed to his own place." And on the 5th of February thereafter, the Court adhered to their former interlocutor, and refused the desire of the petition."

Entered,  
3 Feb.  
1725-6,

The appeal was brought from " an interlocutor and decree of the Lords of Session of the 1st of January 1725, and the affirmance thereof the 5th of February following".

The appellant, from the respondent's case, appears to have contended, 1st, that this was a penal irritancy, and purgeable ; 2d, that Haystoun had homologated the transaction by payment of one of the bonds, in 1671 after the day of performance on the earl's part was elapsed ; 3d, that it was again homologated in 1677, when Haystoun sold his estate, subject to the payment of the bonds to the Earl of Dumfermline ; and 4th, that Haystoun's claim to be reponed, after payment of one of the bonds, was cut off by prescription.

#### *Heads of the Respondent's Argument.*

Though penal irritancies are generally *purgeable* yet a clause inferring no penalty, but only *resolving a bargain*, and putting the parties in the same case they were in before the bargain was struck, as in the present case, neither was nor ever can be found penal or purgeable ; if on the omission to perform, it had been provided, that besides the resolution of the bargain, the party should forfeit a sum of money, that forfeiture would clearly amount to a penalty, which in some cases might be purgeable ; but when no such forfeiture is induced, and when no other hardship is stipulated, than that either party should be in as good circumstances as before the bargain was made, it is impossible that such a condition can be deemed penal. It is not the damage of the party which comes to be considered, where contractors have made it a plain, explicit provision, as in this case.

Though Haystoun, for several reasons, and after lapse of the day, was willing to stand to the bargain, as might be inferred from his payment of one of the bonds ; yet the bargain he was inclined to stand to, was a contract which obliged the earl also to performance of his part, and gave to Haystoun a security for repayment of the sums advanced in case the earl did not *specifically* perform. And though it should be concluded that Haystoun dispensed with the non-performance to that period, yet it cannot be imagined, that he dispensed with the non-performance thereafter, nor for one minute longer than the date of the act of approbation. Besides, he undoubtedly believed himself liable to be questioned for his life, as well as his fortune, when he agreed to give away so great a sum as 30,000 merks for a ratification and remission ;

tion; and so long as these were not procured, so long in his apprehension the danger remained, and knowing himself unable to stand the attacks of his *purchased* friend, as well as of others his foes, he could not in prudence fall out with him, the necessary consequence of his refusing payment of the bond. If that payment then, were the fruit of fear, and not of choice in Haystoun, it would be unreasonable from that involuntary act, to draw the consequences which only follow from the free and voluntary consent of parties.

When Haystoun sold his estate, and referred to a list of debts, which the purchaser should be taken bound to pay, it was necessary that the said bonds should be inserted in the list, because by an inhibition used by the creditor, they had become real debts on his estate. In the disposition made of the estate of Haystoun, it is provided, "That whatever ease by composition or compensation be obtained by the said Mr. Patrick Lyon (the purchaser) by friendly or amicable agreement, or *legal sentence* from the representatives of the said earl of the sums *given up to be resting* by the said William Grays elder and younger, expressed in the list and inventory of their debts mutually subscribed by them, the said Mr. Patrick Lyon obliges himself to keep account thereof, and apply the same to the use and behoof of the said William Gray younger." From this clause, it is obvious, that Haystoun intended to quarrel this debt, which he states only to be *given up as resting*, but does not say it was due. This further shewed that Haystoun at that time had a settled resolution to insist upon the back bond.

The respondent's right to be reponed, or the cause and foundation of that right, viz. the resolving of the bargain, gave him two distinct claims and interests; one, to have the money restored which he had paid; the other, to deny payment of the bonds, which by the irritancy incurred became void. It was plain he could not attain the first, without a suit for repetition, which after a lapse of 40 years would be barred by prescription: but the *second* being a *right of exception*, could not perish by prescription, but must remain perpetual, and endure as long as the bonds could possibly last.

The respondent made it appear by the writings themselves, that, the earl had no right or patrimonial interest in these sums; that his commission was only to transact and compound; that he was accountable to the Crown for his receipts; and that he had therefore no authority to take the bonds in an underhand hidden manner to blank persons, thereby to cover the extent of his receipts. It was plain therefore, that neither in law nor in equity had he a demand for one shilling.

This day being appointed to hear counsel, counsel appearing for the respondent, but no counsel for the appellant; and the respondent's counsel being heard, and being withdrawn, the answer of the respondent was read, and consideration had of what was offered in this cause: *It is ordered and adjudged, that the appeal be* Judgment.

Journal,  
13 Feb.  
1726-7.

*dismissed, and that the interlocutor and decree, and the affirmance thereof, therein complained of, be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondent the sum of five pounds for his costs in respect of the said appeal.*

For Respondent,

*Dun. Forbes.*

Case 133. William Nisbet of Dirleton, Esq; eldest Son  
Kaims,  
28 Jan.  
1726.  
of William Nisbet, Esq; deceased, by his  
first Wife, and Executor of his said  
Father, - - - - -

*Appellant;*

Janet, Jane, and Willielmina Nisbet, Daugh-  
ters of the said William Nisbet, deceased,  
by his second Wife, by Mr. David Erskine  
of Dun and Others, their Tutors and  
Curators, - - - - -

*Respondents.*

7th March 1726. 7.

*Legitim—Husband and Wife—Provisions to Heirs and Children.—Bonds—*  
Portions to children in a contract of marriage. If not so expressed, do not  
exclude their right of legitim.

Upon a wife's renouncing her thirds, by the contract of marriage, the  
division of the personal estate is bipartite, one half legitim, the other half  
dead's part.

Provisions to children, in this case, do not come off the whole head of the  
executory as a debt; but they are first to impute the legitim in payment of  
these portions, and take the rest as a debt from the dead's part if necessary.

Bonds fall under legitim.

**W**ILLIAM NISBET, late of Dirleton, deceased, had by his  
first wife the appellant, his eldest son and heir, Walter his  
second son, and three daughters.

By contract executed in April 1711, previous to Mr. Nisbet's  
marriage with his second wife, the mother of the respondents, in  
consideration of the lady's fortune, which was considerable, he  
settled upon her lands, to the value of 4000 merks per annum, for  
her jointure, in full satisfaction for her dower, third of moveables,  
or others which she might claim by law, in case she should survive  
her said intended husband: and by the same contract he bound  
himself to lay out the sum of 100,000*l.* Scots in the purchase of  
lands to be settled upon himself in life-rent, and the heirs male  
to be procreated of the said intended marriage in fee; but if there  
should be no heir male of the said marriage, but daughters, Mr.  
Nisbet bound himself and his heirs to pay the several sums follow-  
ing; if but one daughter, the sum of 36,000 merks; if two  
daughters, the sum of 50,000 merks; and if three or more  
daughters, the sum of 60,000 merks, to be divided as the said

William



William Nisbet should think fit, and payable, after his decease, at the daughters' respective ages of eighteen or marriage, with interest from that time; and till the same should be payable, he covenanted to maintain, educate, and alimant the daughters according to their quality; with proviso, that the shares of daughters dying should go to survivors; but if one daughter only should survive, she should have 40,000 merks. There was no proviso, or clause in this contract, that the sums provided to the daughters should be held to be in full of their legitim.

In July 1718, William the father made his will, naming the appellant his eldest son executor, and universal residuary legatee, and disposing his whole moveable estate in his favour, with the burthen of certain legacies, and with a proviso, that the testament should not derogate from the provisions granted to his other children.

In September 1722, when there was issue of the second marriage, one son David, and two daughters Janet and Jane, two of the respondents, William the father, in pursuance of the marriage contract, disposed certain lands of the value of 100,000*l.* Scots and upwards, in favour of the said David and the heirs male of his body; whom failing, to the other heirs male of the marriage; whom failing, to Walter Nisbet his second son of the first marriage. And of the same date, he granted a bond of provision to the respondent Janet his eldest daughter, for payment of 12,000*l.* Scots to her, at the first term after his decease, with interest thereafter, which he declared to be a burden upon the 100,000*l.* Scots provided to the heir male of the second marriage; and that it should be in full of her portion natural, and of all succession she could claim through her father's decease, or her mother's contract of marriage. On the 28th of March 1724, he granted a bond in same terms to his daughter Jane for 9600*l.* Scots.

David, the eldest son of the second marriage, died before his father, whereby his provision went to Walter the second son of the first marriage; and the bonds of provision to the two daughters became void. William the father afterwards died in October 1724, leaving his wife pregnant of the respondent Willielmina, born a few months after her father's death; for her no special provision had been made by the father.

After the father's death, the respondents brought an action against the appellant before the Court of Session, in which they claimed the 60,000 merks specified in their mother's contract of marriage, as a debt upon the appellant; and also a moiety of the residue of the clear personal estate as their legitim. The appellant pleaded, that the legitim was only due to children who had no other provision, and that the respondents were excluded from legitim by the provisions made for them in their mother's contract of marriage. The respondents in answer contended, that these provisions were not given or to be accepted of in full of legitim, but were only to secure a certain sum to the children in all events, but not to deprive them of their legal provisions.

The Lord Ordinary, on the 17th of July 1725, " Found that the provisions in the marriage-contract in favours of the respondents did not exclude the legitim." And the appellant having reclaimed, the Court adhered to the Lord Ordinary's interlocutor on the 2d of December 1725.

The appellant having petitioned against this interlocutor, after answers thereto, the Court, on the 18th of January 1726, " Found that the deceased's moveable estate admitted only a bipartite division, betwixt the children's *legitim* and the deceased's *deads part* by equal portions: and found, that the provisions of the deceased's contract of marriage in favour of his children the respondents must come off the whole head of the executry as a debt; and that what remains after payment of these provisions and of the deceased's other moveable debts, the children come to have a right to the equal half thereof as their *legitim*." The appellant having petitioned against this interlocutor, the Court, on the 8th of February 1726, " adhered to that part of the former interlocutor finding that the deceased's moveable estate admits only of a bipartite division betwixt the children's *legitim* and the deceased's *deads part* by equal portions; and found, that the respondents had a share in virtue of their legitim to the half of the principal sums in bonds due by the deceased." And after a hearing on the point of the *collation* contended for, the Court, on the 11th of same month, " Found that the provisions of the deceased's contract of marriage in favours of his children the respondents, must come off the whole head of the executry as a debt; and therefore adhered to their former interlocutor."

Entered,  
22 Feb.  
1725-6.

The appeal was brought from " an interlocutory sentence of the Lord Ordinary, made the 17th of July 1725, and the affirmation thereof by the Lords of Session the 2d of December following; as also from several other interlocutory sentences of the Lords of Session, of the 18th of January, 8th of February, and the 11th of same February 1726.

#### *Heads of the Appellant's Argument.*

The testator in his contract of marriage with the respondents' mother, having obliged himself, his heirs and executors, to pay 60,000 merks to the daughters of the marriage, the respondents can claim no more than that provision, which the appellant, as heir to his father, would have been obliged to pay them, if the personal estate had not amounted to that sum. It is indeed true, that a father may make provisions to his children by bonds, or other voluntary deeds, which will not exclude their legitim unless so expressed, because of the presumed intention of the father to reserve to them such a claim; but where provisions are made by contract, before marriage, in the way of stipulation with the intended wife and her friends, fixing the share of the father's personal estate to which the children are to succeed; in that case, as  
the

the father's estate is obliged, in all events, to pay them the proportion stipulated in the contract; so he is left at liberty to dispose of the rest as he pleases.

1. If the respondents were not barred by the provisions made for them, in the mother's contract of marriage, yet these provisions behove to be imputed to the legitim (*i. e.* must be reckoned as part of it), and the children could, in so far only as these provisions fall short, have an action of supplement. That this was the rule in the Roman law cannot be a question; therefore, as this doctrine of legitim was wholly derived from thence, it ought to determine the present case, if it were not sufficiently established by the law of Scotland. Bonds of provision granted to children, or portions given with daughters at their marriage, were always imputed in payment of their legitim. The Lord Stair, and Sir George Mackenzie, state this as a settled point in the law of Scotland, as founded in the nature of the thing. The law gives a legitim to the children for their provisions; but does not exclude the father's paying this legitim, either in whole or in part, during his life; and every indefinite payment or provision made, during the father's life, must be imputed towards satisfaction thereof, from the undoubted maxim of law, that, *debitor non presumitur donare*.

Stair's Inst.  
B. 3. tit. 8.  
§ 45.  
Mackenzie's  
Observ. to  
Act Parl.  
3 Car. 2.

All the Scots lawyers agree, that when there is a relict surviving, as in the present case, the executry is *tripartite*. To such legitim the children have a right by succession, and not from any communion or joint interest in their father's estate. And it is *jus tertii*, for the children to question which way their father has disposed of two thirds; and of this there is an express precedent in the case of Allardice v. Smart, affirmed in the House of Lords 12th February 1721-2, where a provision of 24,000 merks was made, in a contract of marriage, to the children of the marriage: the father having transacted with some of the children for small sums, the Court of Session found the benefit of those transactions did not accrete to the remanent children; and although in that case the children had a joint interest, yet the *jus accrescendi* did not obtain.

Allardyce v.  
Smart,  
No. 90. of  
this collection.

But the *jus relictæ* arises from the joint communion betwixt the husband and wife, and the legitim being a debt upon the father to provide such a share of his estate to his children, after his decease, whenever that debt comes to be discharged, and the joint estate of the husband and wife is disburthened thereof, an equal division betwixt the relict and executor must necessarily happen; and all the lawyers who have said that when the wife predeceaseth, the executry is at any time *bipartite*, have considered the case in this light, viz. that upon the wife's demise, her executors have claimed a third, whereby only two thirds remain under the father's administration, to be divided, upon his decease, betwixt the children and his executors; since, then, the wife's executors can claim, and are presumed to have claimed her third, and the children dying before their father are no more considered than if

they

they never had existed, the reasoning cannot reciprocally hold from the one to the other.

By the act of parliament 1669. c. 19. there is no more intended than a regulation of *quots* payable to the bishop; and all the lawyers who have written on the subject, particularly Sir Geo. Mackenzie, have put no other gloss upon it. The legislature might certainly tax what part of a man's moveable estate they thought fit; but such taxation could never regulate the succession of moveables otherwise established.

*Heads of the Respondents' Argument.*

The intention of the marriage-articles was, no doubt, in all events, to secure a certain provision for the daughters, because it might be uncertain what the personal estate of their father might amount to at the time of his decease; but that was by no means to exclude them from the provision the law makes for them; for had the intention of the parties been such, it would have been so expressed, but it not being mentioned to be in exclusion of their legitim they are entitled to both. This is the unanimous opinion of all the lawyers of Scotland, particularly Ld. Stair's Inst. tit. Executry, § 45. Sir John Nisbet, fo. 9. Sir John Stewart, fo. 14. and 132.

The father has a right to, and is the common administrator of all the personal estate during his life only: at his death the personal estate is subject to be divided according to the direction of the law. If, therefore, it excludes the wife's right by a settlement upon her, that does not vest her right in the husband, but the personal estate of the father, which otherwise would have been divided into thirds, will be divided into moieties. If there are children who have accepted of a provision in lieu of their legitim, that does not give the benefit of their share to the husband, but the wife in that case is entitled to a moiety; and there is the same reason, that where the wife accepts of a settlement in lieu of her third, the children should have the benefit of that, and be entitled to one moiety.

By the instructions given to the commissaries in confirming of testaments, the rules of distribution are laid down thus: If there are no children, or only children that are *foris-familiat* (that is, have accepted of a portion in full of their legitim), the testament is to divide in two; and though the case of a wife's renouncing is not expressly taken notice of, yet the reason is the same; for since the non-existence and renunciation of the children are put upon the same footing, the same reason holds where there is no wife, or where she has renounced; if there was no wife, the division would be in moieties; if she had renounced, the division ought to be the same; and so it is in the case of children, and the practice of the Commissary Court is the same in both cases. By the act 1769. c. 19. it is enacted, "That the commissaries admit of no division in testaments in favours of the widow who has renounced, and if a bipartite or tripartite division be prayed

“ by the executor at the confirmation upon her account, if it  
 “ shall appear she has renounced, the testament shall be con-  
 “ firmed without division upon her account.” Consequently, since  
 she is excluded, and no division to be made on her account, the  
 distribution must be in the same manner as if there was no wife,  
 that is by moieties. Nor will it alter the case that the provision  
 made for the wife is out of a real estate, and consequently a fund  
 out of which the children could have no legitim; for if a real  
 estate were given to younger children and accepted by them in  
 satisfaction of their legitim, their renunciation would have the  
 same effect as if so much of the personal estate had been paid  
 them; and so if the husband sells a real estate, though the widow  
 and children would have had no interest therein, if it had not  
 been sold, yet the price becomes personal estate, and adds to  
 that common fund in which the wife and children are severally  
 interested.

The appellant contended, that by act of parliament 1661, c. 32.  
 bonds bearing interest are declared moveable as to some particular  
 cases, yet no notice is taken of the children's legitim, and therefore  
 that they must, as to that, remain still heritable, and consequently  
 not fall under the legitim. But these bonds are by the act declared  
 moveable, that the same might fall to the executors, or belong to  
 the nearest of kin, that is making them moveable as to all effects;  
 and the legislature having it in view to determine in what cases  
 they should remain heritable, expressed it to be, *Quoad fiscum &*  
*relictam*; as they determined in what cases they were to be  
 heritable, and there is no mention of the legitim, they must  
 as to the children be considered as moveable. And since by this  
 act they go to executors or nearest of kin, exclusive of the relict,  
 they must be divided wholly into legitim and dead's part.

Collation, or bringing into hotchpot, was only introduced as a  
 remedy for preserving an equality amongst brothers and sisters,  
 and concerns only the division of the legitim betwixt them, but  
 has no effect upon the extent of that legitim, nor upon the extent  
 of the dead's part, or the widow's share. The right to the legitim  
 is not a succession but a division arising upon the death of the  
 father, and exactly of the same nature with the third due to the  
 widow; and supposing the widow should by the marriage have a  
 particular sum settled to be paid her upon the death of her hus-  
 band, she will not be obliged to bring that into hotchpot, or im-  
 pute it *pro tanto*; no more ought the children what is provided  
 for them. Especially since the provision by the marriage-articles  
 in favours of the respondents is to be considered as a debt, and as  
 such is to be paid before any division can be made, for the divi-  
 sion operates only upon the residue of the personal estate after all  
 debts paid, and if they are creditors they ought not to impute;  
 and of the same opinion is Sir George Mackenzie, for he says,  
 “ If children get bonds of provision from their father, they are  
 “ not thereby excluded from their legitim, nor are they obliged  
 “ to collate these bonds of provision, and to impute them as a part  
 “ of their portion natural, but they have right to them as mere

B. 3. tit. 9.  
 § 11.

"creditors, and may likewise seek their legitim:" and thus it has been determined in several cases.

Judgment,  
7 March  
1796-7.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentence of the Lord Ordinary of the 17th of July 1725, and the affirmance thereof be affirmed; and it is further ordered and adjudged, that so much of the interlocutory sentence of the 18th of January 1726 as appoints only a bipartite division betwixt the children's legitim and the deceased's part by equal portions be affirmed; but that the other part of the same interlocutory sentence whereby the Lords of Session found "That the provisions in the deceased's contract of marriage in "favour of the children, the plaintiffs, must come off the whole head "of the executry as a debt," be reversed: and it is also ordered and adjudged, that the interlocutory sentence of the 8th of February 1726 be affirmed; and it is hereby further ordered and adjudged, that the respondents have their full legitim as to the demands of the 60,000 merks, or any part thereof that may become due by the marriage-contract, when the same shall become due, and be demanded; that then what shall have been received on the account of the legitim shall be accounted and imputed as payment pro tanto of the marriage contract.*

For Appellant, *P. Yorke.*

*Dun. Forbes.*

For Respondents, *C. Talbot.*

*Will. Hamilton.*

That part of the judgment here reversed, relative to the children's provisions being taken off the whole head of the executry as a debt, is given as an existing precedent by Lord Kaims in his Decisions. I do not find this stated in the Dictionary, or in Bankton or Erskine; but the judgment of the House of Lords seems directly contrary to the doctrine laid down in Erskine, B. 3. Tit. 9. § 22. on this point, supported by two decisions, Dickson, 19th June 1678, and Murray, 16th July 1678.

This case agrees more with the decision in the important case of Hog and Lashley, in the House of Lords, 7th May 1792, than the case of Allardyce v. Smart here mentioned does. The present, however, is not upon points precisely similar to those in these other cases.

Patrick Haldane, Esq;	-	-	-	<i>Appellant;</i>	Cafe 134.
Sir Alexander Anstruther, Bart. Robert					Edgar,
Lumsden of Innergellie, and Isabel Lady					29 Dec.
Dowager of Innergellie, his Mother, Mr.					1724.
Walter Wilson, and Sir John Anstruther,					
Bart.	-	-	-	<i>Respondents.</i>	

20th March 1726-7.

*Sol.*—By articles of agreement for the sale of an estate, the disposition was to be delivered by a day certain, and the price to be paid ten days afterwards; but the seller was not obliged to deliver the disposition till heritable security was granted for the price.

The estate being much incumbered, the creditors are preferred to the price upon assigning their debts with absolute warrandice.

ON the 6th of August 1720 the respondent, Sir Alexander Anstruther, granted a faculty to his lady, empowering her in his name to receive all sums of money due to him, and to sell and dispose of any of his real estate, promising to ratify what she should do therein. By articles of agreement, bearing date the 17th of the said month of August, entered into between Sir Alexander's lady and the appellant, she sold to the appellant the lands of New Grange, and others therein mentioned; and became bound, that Sir Alexander should execute a proper conveyance of the premises, with absolute warrandice, to the appellant, his heirs and assignees, with an assignation to the rents for the year 1720, to be delivered to the appellant on or before the 1st day of November then next, with a sufficient progress of writs: in consideration whereof the appellant became bound to pay to the respondent Sir Alexander the price of the said lands, at the rate of 30 years' purchase, conform to a rental to be given in thereof; the appellant, at the execution of the articles, paid 7000 merks to Sir Alexander's lady, and agreed to pay the residue of the price on or before the 1st day of the said month of November.

The appellant was immediately let into the possession of, and continued to possess the premises, and receive the rents thenceforward. By a rental delivered to him, it appeared, that he was to pay the sum of 19,021*l.* 1*s.* 8*d.* Scots over and above the sum paid by him at the execution of the articles. On the 21st of September 1720, Sir Alexander executed a disposition and conveyance of the premises, which was tendered to the appellant before the 1st of November that year; but application being then made to the appellant to give a real security upon the same lands for the price, which was payable eleven days after, the appellant refused to accept the disposition under the condition insisted on relative to the security.

The

The respondent Sir Alexander being much encumbered with debts to the respondents and sundry other creditors, the respondents arrested the price in the appellant's hands, and afterwards brought an action of forthcoming against him. The appellant also brought an action of multiple pouding, in which various proceedings were had, and interlocutors pronounced, on the subject of the preferences of the creditors upon the price, not necessary to be detailed.

The appellant afterwards brought an action for reduction of the said articles, upon the ground that the disposition was not delivered to him at the day limited, and because the premises were encumbered and the title thereto not clear. The causes coming to be heard before the Lord Ordinary, his lordship, on the 31st of January 1723, "Found that the creditors of Sir Alexander must purge or clear the incumbrances, as also produce in court the writs of the lands of New Grange, before the decree in their favour be extracted." And after further proceedings, the Court, on the 30th of December 1724, "Found the said articles a binding contract upon the appellant, the said Sir Alexander producing his brother's infeftment, and a sufficient progress, unless the appellant could condescend upon incumbrances that would exclude his right; but before payment of the price, found that all the creditors ought to be brought into the multiple pouding now depending, in order to be discussed."

The appellant having stated in debate, that his right was excluded by adjudications led on the premises of a date posterior to the articles, the Lord Ordinary, on the 20th of July 1725, "Found that the right made by Sir Alexander Anstruther to the appellant of the lands of New Grange is not excluded by the posterior adjudications." One of the creditors, adjudgers, having reclaimed against this interlocutor, the Court, on the 11th of November 1725, "having considered that the bargain of sale had taken effect, refused the desire of the petition, and adhered to the Lord Ordinary's interlocutor."

And it having been remitted to the Lord Ordinary to hear parties upon the warrandice to be given by the creditors arresters upon their receiving their money, his lordship, on the 7th of January 1726, "Ordained the creditors, upon payments of their debts, to discharge the appellant of so much of the purchase-money as the said debts amounted to, with absolute warrandice, and for his further security to assign their debts to Mr. Haldane, so far as the same might affect his purchase, for his further security thereof alienarily; and ordained the decree to go out and be extracted accordingly."

The appeal was brought from "several interlocutory sentences of the Lords of Session, of the 18th of July 1722, the 31st of January, the 9th of July, and 26th of December 1723, the 13th of February, the 18th of June, the 2d and 30th of December

Entered,  
3 Feb.  
1725-6.



“ cember 1724, the 23d of June, the 20th of July, and 18th of  
 “ November 1725, and the 7th of January 1726 (a).

*Heads of the Appellant's Argument.*

This bargain was not performed on Sir Alexander's part on the 1st of November 1720, nor at any time thereafter; on the contrary, he refused to deliver any conveyance to the appellant except upon the terms of having the purchase-money paid or secured to him at the time of delivery; though by the articles of agreement the conveyance was to have been delivered some days before the price became due, to give the appellant an opportunity of examining into the sufficiency of the right; and establishing his own title before he paid the money.

The admitting of a few of Sir Alexander's personal creditors to perform the articles for him is a great stretch of the articles to the disadvantage of the appellant. For the warranty appointed to be given to the appellant is not such as he is entitled to by the articles, that being one warranty for the quiet possession of the lands, whereby the appellant might have affected the whole other estate of Sir Alexander; but these are several warranties, not for securing the purchase, but only for refunding certain parts of the purchase-money to be taken from Sir Alexander's different creditors, some of whom have no estates, or but very small ones, liable to be affected by such warranties.

*Heads of the Respondents' Argument.*

The appellant, immediately upon the execution of the articles, was let into the possession of the premises, and is now in possession thereof, and has received all the rents and profits to his own use. Though the price was not to be paid till the 11th of November, yet nobody is obliged to deliver an absolute conveyance to an estate, without having the price paid or secured; and all that was desired of the appellant was only to give an heritable security, upon the premises sold, for securing the payment of the price, not to the respondent Sir Alexander, but to such of the respondents, Sir Alexander's creditors, as had the prior incumbrances affecting the premises sold.

All the creditors of the respondent Sir Alexander, claiming any right to the premises, are parties to the suit: their several rights have been produced, and considered by the Judges, who have determined the priority in which the creditors are to be paid; to this determination the creditors have submitted, and no complaint is made by any of them. There seems, then, no occasion for the appellant to make use of this as a handle against paying the price, especially since the Judges have directed, that the creditors shall not only assign their debts to the appellant to protect the inheritance; but that the several creditors, upon payment, shall give absolute warranty: the effect of which is, that they

(a) It appears to be unnecessary in this case to detail the numerous interlocutors, which chiefly related to the preferences of the creditors.

shall be obliged to indemnify the appellant, as to any demands, so far as relates to the several sums to them respectively paid, which is rather a confirmation of the appellant's title, than any prejudice to it.

Judgment,  
20 March  
1726-7.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed; and that the several interlocutory sentences therein complained of be affirmed.*

For Appellant, *P. Yorke. J. Willis.*

For Respondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Case 135. Elizabeth Duchess of Hamilton, - - - *Appellant;*  
James Duke of Hamilton, - - - *Respondent.*

29th March 1727.

*Process.*—A widow brings an action against her son, as his father's heir, to make good a jointure, which she alleged was deficient: the son contends that the pursuer had not implemented her part of the marriage-articles, and calls upon her to produce her duplicate of them; stating that the other duplicate was produced by him in a suit between the parties in Chancery in England: she declining to do this, is ordered before answer to produce her part of the marriage-articles.

THE appellant in the year 1722, brought her action against her son the respondent, setting forth: That previous to her marriage with James late Duke of Hamilton, he by his bond of provision, bearing date the 15th of July 1698, for and in consideration of the said marriage, and of the appellant's portion of 10,000*l.* sterling, of which he acknowledged the receipt, bound and obliged himself, his heirs and successors, to provide and secure the lands and baronies of Kinneil, Caridden and Abbotscarfe, with the castles, towers, fortalices, and pertinents, therein particularly mentioned and described, to the appellant in life-rent for her jointure, during all the days of her lifetime, and to infest and seise her in life-rent therein; and the duke warranted these lands, baronies, and others to be then worth, and to be worth and pay yearly at the appellant's entry thereto, and during her lifetime the sum of 1500*l.* sterling, by and attour the manor-place of Kinneil; and he bound himself to free and relieve the appellant yearly during her lifetime of all feu duties, blench duties, teinds, ministers' and schoolmasters' stipends, building and repairing of manes, repairing of churches and church-yard dikes, and the king's ordinary taxation:

That the said duke not being himself infest in the said lands, baronies, and others in 1702, joined with his mother Ann late Duchess of Hamilton, in whom the feudal right was vested, in executing a confirmation of the said bond of provision, containing a precept of seisin, upon which the appellant was accordingly infest:

That

That the said duke died in November 1712, leaving the respondent his eldest son and heir; and Ann Duchefs of Hamilton died in October 1716, and upon her death, the appellant became entitled to the possession of the said jointure, lands, baronies, and others:

That the appellant having entered upon the same, found that they were not worth above 1000*l.* sterling per annum, clear of all deductions; so that the appellant suffered the loss of 500*l.* sterling per annum: and her action concluded, that the respondent should make payment to her of the *intake* of 500*l.* per annum since she had been entitled to her jointure, and in time coming, agreeably to the bond of provision, and deed in confirmation thereof; and that the appellant should also be quieted in the enjoyment of the said lands, baronies, and premises.

The respondent stated for defences in this action, that by the articles of marriage executed between the appellant and his father, the appellant was bound to settle her estate in England in favour of a trustee for the behoof of the eldest son of the marriage; but that the appellant had not fulfilled this obligation upon her part; and the bond of provision libelled on having been of same date, and granted in part performance of these marriage-articles, the several provisions in which, in favour of each party, were the mutual causes of one another, he contended that no process could be sustained at the appellant's instance on the bond of provision, until she settled her English estate in the manner agreed on by the marriage-article. Of these marriage-articles he produced, what he stated to be, a copy, mentioning that his father's part or duplicate thereof was produced by him in a suit in Chancery in England between the appellant and him: and he contended that she should produce her part or duplicate of these marriage-articles.

This cause was reported by the Lord Ordinary, and having been argued before the Court, their lordships on the 8th of December 1724 "Before answer ordained the appellant to produce her part of the principal marriage-articles."

The appeal was brought from "an interlocutor order of the Lords of Session of the 8th day of December 1724."

Entered,  
1 Feb.  
1726-7.

*Heads of the Appellant's Argument.*

The appellant ought not to be obliged to produce before the Lords of Council and Session her part of the marriage-articles, but the respondent having a part thereof in his own custody, and having admitted the same in the proceedings, if he intended to have any benefit thereby in the said action, it was incumbent upon him to produce the same; and if the fact had been that the respondent's part of the marriage-articles was produced, and then lying before the Court of Chancery of England, in a suit betwixt him and the appellant (as was alleged on the respondent's part), yet that would not have been a sufficient foundation whereon to ground the interlocutor; for it would be as necessary for the appellant to have her part of the said marriage-articles in England to

to make her defence in the said suit, as for the respondent to have his part.

If this rule be admitted, it will follow that if any person being in England is forced to sue in the courts of justice in Scotland, and the defender thinks fit to allege some articles or settlements concerning the title to the pursuer's estate in England, though not strictly in issue in the cause, such pursuer must be for ever stopped in his suit, unless he sends down the title-deeds of his estate in England to be produced before the Judges in Scotland.

*Heads of the Respondent's Argument.*

If an action is brought for the performance of an agreement, and the defender insists that the pursuer has a deed in his possession which will be a bar to the suit, or stay the proceedings therein, the pursuer ought to be decreed to produce that deed; and it is the constant and daily practice in the Court of Session so to do. If the pursuer does not comply with such direction, he has himself only to blame that the suit is at a stand: and as the appellant does not pretend she has not a part of these articles, so, had she produced them, the suit might have been at an end before this time. The respondent's part of the said articles was then in England, and could not be produced at that time; but he produced a copy of the articles, and was willing it should be taken as a true copy; and if the appellant would have agreed to that, the necessity of even her producing the articles might have been saved; but that was not agreed to.

Judgment,  
29 March  
1727.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory order therein complained of be affirmed.*

For Appellant, P. Yorke. J. Strange.

For Respondent, Dun. Forbes. C. Talbot. Will. Hamilton.

Simon Lord Lovat, - - - *Appellant*; Case 136.

Sir James Mackenzie, of Roystoun, one of the Senators of the College of Justice; Roderick Mackenzie, second Son of Alexander Mackenzie, late of Frazerdale, and his Guardian; Mrs. Emilia and Margaret Frasers, Daughters of the said Alexander Mackenzie, and the said Alexander Mackenzie as their Guardian; Mr. William Scott, Professor of Greek in the College of Edinburgh, and his Children; Alexander Mackenzie of Garloch; Roderick Macleod of Cadboll; Kenneth Mackenzie Writer in Edinburgh; and John Paterfon of Prestonhall, Esq; *Respondents.*

13th April 1727.

*Donator of Escheat competing with a Trustee.*—A father conveys his estates to a trustee for certain purposes; after the father's death, the trustee sells part of his estates, and bond for the price is taken in the name of the trustee's son, who of same date grants a back bond to the trustee, in terms of the father's trust deed; the son is afterwards denounced for treason, and his escheat granted to a Donator; but he subsequently grants an assignation to his father's trustee, which, in a competition with the donator, is sustained.

*Trustee.*—The creditors of a trustee could not affect the trust estate.

*Competition of Creditors and Children.*—Certain creditors being preferred to a sum set apart for children's provisions, the creditors are ordained, upon receiving payment, to convey their rights to the children, to enable them to operate relief on other subjects of the debtor.

*Consent of Party.*—The donator who consented to a decree of preference to the children, having contended that this consent did not extend to the creditors, who were preferred to the children, and petitioned to be heard against them, the prayer is refused.

*Costs.*—An affirmance with 60*l.* costs.

ON the 11th of May 1710 Roderick Mackenzie of Prestonhall, one of the senators of the College of Justice, by a deed executed, with consent of Dame Margaret his spouse, and of Alexander Mackenzie of Frazerdale, his only son, conveyed his estate of Prestonhall absolutely to Sir James Mackenzie of Roystoun, one of the senators of the College of Justice: the disposition declared it was granted to the end the said estate might be sold, and the price thereof applied towards the relief of Lord Roystoun in the engagements he had or should come under for Lord Prestonhall, in the first place; towards payment of, the creditors who had real rights affecting the premises in the second place; and lastly, for the ends and uses mentioned in a back bond executed by Lord Roystoun, of same date with the disposition. Lord Roystoun, of same date, accordingly executed this back bond, reciting the said disposition, and binding himself not to sell or dispose of the said estate, but with the consent of Lord Prestonhall, while in life;

life; and after his death, with consent of Dame Margaret his spouse, Alexander his son, and George Earl of Cromarty, or any two of them, or the survivor of them, and to apply the price for payment of the debts in which he himself was bound in the first place; for payment of real creditors affecting the premises in the second place; and to lay out 40,000*l.* Scots of the remainder upon some real security for the jointure of the said Dame Margaret during her life; and in case of her predecease the fee thereof was provided to Lord Prestonhall himself, or to such person or persons as he should appoint by any writing under his hand; and failing such appointment, or in the event of his dying before his lady, in either of these cases the fee of the said sum was provided to Roderick Mackenzie, the second son of Alexander Mackenzie of Fraserdale, and Emilia and Margaret his two daughters, the grandchildren of Lord Prestonhall, in the proportion of 40,000 merks to Roderick, and 10,000 merks to each of his sisters.

Lord Prestonhall died in January 1712. He had received the rents till his death, and, till the estate was sold, his son Alexander Mackenzie of Fraserdale received the rents and profits. On the 9th June 1715, Lord Roystoun with the consent of Alexander Mackenzie (Dame Margaret and the Earl of Cromarty being then dead) sold and conveyed the premises to the respondent John Paterfon, at the price of 91,400*l.* Scots. The purchaser being allowed to retain a sum equal to what would clear off the real debts affecting the estate, on the 22d of June 1715, granted his bond for the remainder, being 78,315½ merks, to the said Alexander Mackenzie. And, of same date, Alexander Mackenzie executed a back bond in favour of Lord Roystoun, reciting the disposition by Lord Prestonhall, Lord Roystoun's back bond, the disposition to Mr. Paterfon, and bond granted by him for the price, and obliging himself either to apply the money due by Paterfon's bond to the uses mentioned in Lord Prestonhall's disposition, or otherwise to assign Paterfon's bond to Lord Roystoun, that he might apply the money to the same uses.

Alexander Mackenzie not having appeared and given security for his peaceable behaviour in terms of the act 1 G. I. c. 20. *for encouraging all superiors, &c.*, was, after this period, disinherited, and his single and life-rent escheat were forfeited to his majesty. In consideration of the appellant's services in suppressing the rebellion, his majesty, on the 23d of August 1716, made a grant of the said single and life-rent escheat to the appellant. And after this period, on the 23d of March 1717, Alexander Mackenzie, who got free of further consequences of his denunciation, executed, in favour of Lord Roystoun, an assignation of the bond granted by Mr. Paterfon for the balance of the price of Prestonhall.

On the 14th of March 1722, Lord Roystoun assigned to the respondents Roderick, Emilia, and Margaret, the sum of 40,000 merks, being all the money remaining due upon the said bond of Mr. Paterfon's, according to their respective interests. And thereupon Roderick, and Sir James Sinclair his curator, and Emilia and Margaret, by their father and administrator in law, brought

brought their action before the Court of Session, against Mr. Paterfon, to recover payment of the said 40,000 merks. Mr. Paterfon, in this action, admitted the debt, but pleaded that he was not in safety to pay, on account of the appellant's gift of escheat, and that arrestments had also been laid in his hands by several creditors of Lord Prestonhall, and of Alexander Mackenzie. The appellant, though not a party to this action, appeared at a calling of the cause, by his counsel, on the 16th of February 1724, who declared, "that he was instructed by the donator not to object against the pursuer's obtaining decret for payment of the sums libelled, and to consent thereto."

The Lord Ordinary, on the 18th of February 1724, "Found, that the back bond granted by Frazerdale to the Lord Roystoun, being relative to and of the same date with the bond for the remainder of the price granted by Mr. Paterfon to Frazerdale, both which bore date the 22d of June 1715, and was in prosecution of a transaction anno 1710, between the deceased Lord Prestonhall and the Lord Roystoun, which excluded all suspicion of collusion, did affect and qualify the said bond in the person of Frazerdale, as a trust in his name for my Lord Roystoun's behoof, and for the ends and uses mentioned in the back bond; and that the same being prior to Frazerdale's denunciation, the said denunciation could not prejudice the effect of the said back bond; and therefore the assignation granted by Frazerdale, and transference by the Lord Roystoun in favour of Frazerdale's children, stood good, notwithstanding of Frazerdale's denunciation prior thereto. As also, by reason of the said back bond, found, that none of Frazerdale's creditors could arrest the subject of the bond in prejudice of the children's right, acquired by the said back bond: and therefore, and in regard that the donator of Frazerdale's escheat disclaimed any interest in the said bond, and did not object against the pursuer's preference, decreed and declared in the terms of the libel, at the children's instance, with the burden always of the security of the purchased lands to Mr. Paterfon, according to stipulation thereanent, and with the burden of purging the arrestments laid on in the purchaser's hands at the instance of the deceased Lord Prestonhall's creditors."

Soon after, Mr. Paterfon brought his action of multiple poinding, against the arresting and other creditors of Lord Prestonhall, in which the appellant was also called for his interest. And the respondent, Mr. William Scott, on behalf of himself and his children as creditors of Lord Prestonhall, brought an action of reduction and declarator against Lord Roystoun, the grantee of Lord Prestonhall, insisting that the disposition to him was fraudulent, and ought to be set aside, and that his debt ought to be paid out of the residue of the price due by Paterfon and the other respondents. The other creditors of Lord Prestonhall made themselves parties to this action of Mr. Scott's; and the same was also conjoined with the action of multiple poinding.

In these conjoined actions, several interlocutors were pronounced, preferring the creditors of Lord Prestonhall to his grandchildren; and the question of preference between these creditors themselves, having been disputed for near two years, the Lord Ordinary, on the 20th of July 1726, pronounced the following interlocutor: "Preferred Lord Roystoun to as much of the said sum resting by Mr. Paterson, and contained in the said bond granted by him, as would satisfy and pay him the sum of 38,315 $\frac{1}{4}$  merks, and interest thereof from Whitsunday 1715, during the not payment (to which he restricted his payments and engagements for Lord Prestonhall) *primo loco*; and found that the other creditors and the children, in the order of preference after mentioned, could only draw the 40,000 merks of principal assigned to the children, and such part of the interest as was resting since Whitsunday 1715, and the interest of the said sum in time coming; and found it was instructed by the said bond, and condescendance given in by Mr. Paterson, that he was resting of the price of the said lands at Whitsunday 1715 (besides the sum for which the Lord Roystoun was preferred as above) the sum of 40,000 merks; and found him liable to the said creditors and pursuers for the said sum and interest thereof from the said term of Whitsunday during the not-payment; and preferred certain creditors of Lord Prestonhall in the order then settled *primo loco*. Preferred the said children of Fraserdale, in the next place to the remainder of the said sum found due by Mr. Paterson, and decerned Mr. Paterson to make payment accordingly; and discharged all the other persons called by the multiple poinding to molest him on that account in time coming; and decerned the several creditors preferred as above on the sum transferred to the children, to assign and give up their grounds of debt and diligences respectively in favour of the said children, in order that they might operate their relief out of any other subject or estate which belonged to Lord Prestonhall or Fraserdale as accords of the law."

The appellant now appeared as a defender to the multiple poinding, and gave in a representation to the Lord Ordinary, praying that the proper officer might be directed to give him up the process to be considered, receive his title as donator of escheat, and in the mean time stop extracting the decree. The Lord Ordinary, on the 25th of July 1726, "Ordained the other parties concerned to see this representation, and all parties to be ready next day to argue the same before him." The cause being accordingly argued on the 26th of July the respondents insisted that the subject in question being of the effects of Lord Prestonhall, the appellant could have no interest therein; and they referred to the judicial consent given two years ago by the appellant's counsel to the decree in favour of Lord Roystoun: the Lord Ordinary thereupon, of that date, "Refused the prayer of the appellant's representation, and allowed the decree to be extracted."

The



The appellant thereupon reclaimed: The Court, after a hearing, on the 29th of July 1726, "adhered to the Lord Ordinary's interlocutor, and refused the desire of the petition."

The appeal was brought from "several interlocutory sentences or decrees of the Court of Session of the 18th of February 1724, the 20th, 25th, 26th, and 29th of July 1726." Entered,  
1 Feb.  
1726-7

[It has not been deemed necessary to detail the argument on either side upon this case: such argument relating almost entirely to the circumstances involving the fact of the trust, impugned on one side, and defended on the other, upon which no correct information is given.]

After hearing counsel, *It is ordered and adjudged, that the said Judgment, petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 60l. for their costs in respect of the said appeal.* 13 April  
1727

For Appellant, Dun. Forbes. Will. Hamilton.  
For Respondents, P. Yorke. Ch. Arskine.

David M'Culloch, of Pilton, - - - Appellant; Case 137.  
Christian M'Culloch, - - - Respondent.

17th April 1727.

*Aliment by a mother to her son, if granted animo donandi or not.*—A father grants bond of provision to a younger son, in a certain sum, binding himself and his heirs to aliment him till 21, or to pay interest on the bond: the mother marries a second husband, and in her marriage-contract stipulates a power of alimentering her son, out of her jointure from her first husband: in a process by the assignee of the younger son, against his eldest brother, for interest, as not being alimented by the father's heirs, such interest is decreed, and the mother is found to have alimented the younger son *gratis*.

*Litigious.*—The eldest son, pending this action, paid his mother's second husband a sum for his younger brother's aliment, but it is found that the discharge, taken for that sum, being granted *pendente processu*, did not influence the cause.

*Bond.—Termly Penalty.*—A bond of provision by a father contains a clause of annual-rent, but no penalty on failure: in an action of damages for not punctual payment of interest, and expences thereon incurred, the defence that the bond contained no termly penalty is overruled.

*Costs.*—An affirmance with 80l. costs.

**JAMES M'CULLOCH** of Pilton left issue three daughters, Jane, the respondent Christian, and Catherine; and two sons, David the appellant, and Alexander, who were twins. The real estate descended to David the appellant, as eldest son; to his other children he granted bonds of provision, payable at the first terms of Whit Sunday, or Martinmas, after Alexander should attain his age of 21 years, or the daughters be married, with interest from the terms of payment; and he bound himself and his heirs to aliment and educate these younger children severally till the interest upon

their bonds became payable; and upon failure to maintain, edd care, and instruct them, he bound himself and his heirs to pay them the interest of their provisions, beginning at the first term of Whitsunday or Martinmas after such failure. The provision to Alexander was 10,000 merks, to the respondent Christian 4000 merks, and to Catherine 3000 merks.

James M'Culloch died in February 1703, and after his death the appellant David and his brother Alexander, then minors, were alimented by their mother; they did not attain to 21 years of age till 1714. In 1705 the mother intermarried with Mr. Ross, her second husband; and by their marriage-contract it was agreed, that during the lifetime of Lady Lindores, who life-rented great part of Mr. M'Culloch's real estate, it should be in the power of the mother to apply such part of her jointure from her first husband as she thought fit, not exceeding three chalders of bear or oatmeal yearly, for the maintenance of the appellant and his brother Alexander, whilst they should remain in family with her. And she at same time made over to her said second husband a debt of 2000 merks, to which she had right as executrix confirmed to her first husband, and which Mr. Ross agreed should be a fund for the aliment of her two sons David and Alexander.

Accordingly the appellant and his brother continued in family with their mother till May 1710, when their uncle and tutor at law took charge of them, and settled them first at school at Inverness, and afterwards at Edinburgh.

In May 1715 the respondent procured from her brother Alexander an assignment of so much of the interest of his bond of provision from his father, due preceding the term of Whitsunday 1715, as should amount to the sum of 100*l*. And the respondent thereupon commenced her action against the appellant for that sum. The appellant stated for defence, that Alexander's bond of provision entitled him to no annual-rents till his majority, except upon failure of alimenting and educating him; but that Alexander had been constantly maintained and educated, as the appellant was, till his majority in August 1714. After the commencement of this process the appellant accounted with his mother's second husband for his own and his brother Alexander's aliment, paying a balance in money to Mr. Ross, and taking a discharge for the same.

The marriage-articles between Mr. Ross and the appellant's mother were produced; and the cause stood over till 1724, but being then revived, the respondent insisted, that the marriage-articles were a proof that the mother intended to make a present of Alexander's aliment to himself; and that the aliment having been so furnished by her *animo donandi*, the payment made by the appellant in 1716 could not be construed as a satisfaction for that aliment, especially since the account was settled after the appellant was put in *mala fide* to make any such transaction by the commencement of the action.

After sundry proceedings, and a reclaiming petition and answers, the Court, on the 1st of January 1725, "Found, that Mr. Ross's discharge, being granted *pendente processu*, doth not influence the cause, and that Alexander was alimented by the mother *gratis*; and that the benefit thereof doth accresce to the said Alexander, reserving the further consideration if the said benefit ought to be extended further than the value of the aliment." And to this interlocutor the Court adhered on the 29th of the same month of January. The appellant having presented a petition, praying that extracting the decree might be stopped, the Court, after answers, on the 20th of February 1725, "refused the desire of his petition."

During the dependence of the said action, the respondent had obtained a decree, in 1715, against the appellant for payment to her of the interest on her own bond of provision for 4000 merks, and on her sister Catherine's bond for 3000 merks, to which she had right by assignment, until the principal sums should be paid. She afterwards insisted, in a fresh action, to have the appellant decreed to pay the principal sums to the respondent; and also to pay a sum of money, in name of damages and expences, through her not having received punctual payment of her interest since 1715. The appellant in defence stated, that all the interest was paid up but for one year; that there was no penalty in the bond for not punctual payment of the interest, and that no damages could be demanded, as the debtor had accepted of her interest, though perhaps later than the day of its falling due.

The Lord Ordinary dismissed the libel as to the principal sums, and having reported the remainder of the cause to the Court, their lordships, on the 19th of February 1724, "Found the appellant liable in damages and in the expences of process." A condescendence having been given in, the Lord Ordinary, on the 3d of July 1724, "modified the damages and expences to 456*l.* 18*s.* 4*d.* Scots, and decerned." To this interlocutor his lordship adhered on the 18th of July 1724, and the appellant having reclaimed, the Court, on the 24th of July, refused the desire of his petition.

The appeal was brought from "several interlocutory sentences of the Lords of Session, made the 19th of February, the 3d, 18th, and 24th days of July 1724, the 1st of January, and the affirmance thereof, and an interlocutor of the 20th of February 1725." Entered,  
12 March  
1724-5.

#### *Heads of the Appellant's Argument.*

The interest, by the express condition of the bond to Alexander, was not to commence till he was 21 years complete; in consideration whereof he was to be alimented at the appellant's expence; and interest was only to become due before his majority, upon failure of alimenting, the next term after such failure, so without proof made of a failure in alimenting, the interest could not be found due; and the *onus probandi* ought to have lain on the respondent.

It appeared in court that the appellant did aliment his brother Alexander, inasmuch as his mother did furnish that aliment, partly out of the appellant's effects, and partly out of her own, and had allowance in account, and repayment of what she so furnished.

His mother's furnishing aliment to Alexander could not be considered as a donation *ex pietate materna*, because Alexander had of his own to aliment him with, viz. the obligation which lay upon the appellant to aliment him.

If the mother's act, in alimentering the appellant and his brother, is to be considered as a donation, it must be presumed a gratuity to the appellant, because it helped to fulfil the obligation under which he lay, and appears to have been intended to continue until his estate was relieved of the burden of the life-rent of the Lady Lindores.

Bonds in the law of Scotland are considered to be *stricti juris*, and therefore afford action no further than is expressly stipulated in them: now in the bonds in question there is a penalty adjoined upon the failure of paying the principal sum, but there is no penalty added upon the failure of paying the interest precisely at a day; and therefore the demand for expence and damages ought not to be allowed.

Though it should be allowed that the respondent ought to be reimbursed of any charges really expended in recovering payment, she could have no pretence to damages, of which no account is given, nor proof made; and which, as they are decreed, exceed by much the value of the whole interest owing to her at the time of making the demand.

#### *Heads of the Respondent's Argument.*

This assignment was made many years after the said Alexander was alimented, and when he was come of age, (no demand having ever been made on that account), and was obtained *pendente processu*.

As aliment furnished by a parent to an infant, without demanding a previous settlement for it, or claiming satisfaction, even after the son was of age, is presumed to be given, and to proceed *ex pietate parentis*; so the gift can never bear a construction in favour of any other than the child so alimented, where it is not otherwise expressly declared. The mother having in her contract of marriage with her second husband, reserved a power to apply part of her jointure for the aliment of her sons, the appellant and Alexander, she thereby plainly signified her intention to renounce all demand for the expence of such aliment for the future, till they came of age; which was a convincing argument, that the former aliment was a gift, and could not be retracted by her husband after the marriage, he having renounced his interest therein. By the bond of provision the appellant was bound not only to aliment, but likewise to educate the said Alexander at school, college, law, or any other science that he should incline to, or pay the interest of the money; and there-

therefore the subsistence furnished by the mother did not fulfil the condition of the bond, the appellant not having at any time been at the least expence toward his education.

The power in the contract of marriage was only to dispose of part of the jointure for maintenance, but not for education of the said Alexander. The giving bread to her own child could be deemed a favour to himself only, and the rather for that a condition is added in the said contract, that during the continuance of the maintenance her sons should remain in the custody and keeping and under the power and direction of their mother.

The appellant had, as heir to his father, a very considerable estate; and the respondent but a poor provision. Nevertheless the appellant was so litigious, that, without a suit at law, she could not recover any one term's interest; whereby she was obliged to accept of any payment the appellant was pleased to offer. But being thereby reduced to very great necessities, and obliged to contract debts, whilst these suits were depending, which were drawn out to an intolerable length, and having never released her claim of damages, which had been taxed far below her real expences, her demand was just and well founded both in law and equity.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutory sentences, and the affirmances thereof, therein complained of, be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the said respondent the sum of 80l. for her costs in respect of the said appeal.*

Judgment,  
17 April  
1727.

For Appellant, *Dun. Forbes. C. Talbot.*  
For Respondent, *C. Erskine.*



# APPENDIX.

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**T**HE twenty-five cases of appeal, at the instance of the Commissioners and Trustees for the forfeited Estates, noticed briefly at the end of the appeal brought by these Commissioners No. 64, and Trustees v. James Drummond, in which the judgments of the Court of Session were found to be null and void for want of jurisdiction, are as follows;

1. *The Commissioners and Trustees of the forfeited Estates v. Thomas Erskine of Mar*, entered 15th Dec. 1719, decided 15th Feb. 1719-20.
2. *Ditto v. John Stirling*, eldest son of James Stirling, late of Keir, entered 18th Dec. 1719, decided 17th Feb. 1719-20.
3. *Ditto v. Andrew Cassie* of Kirkhouse, entered 18th Dec. 1719, decided 17th Feb. 1719-20.
4. *Ditto v. Wm. Maxwell*, son to William late Earl of Nithsdale, entered 18th Dec. 1719, decided 14th March 1719-20.
5. *Ditto v. John Erskine* of Balgownie, entered 18th Dec. 1719, decided 14th March 1719-20.
6. *Ditto v. George Earl of Kinnoul and George Hay Drummond*, his eldest son, entered 18th Dec. 1719, decided 14th March 1719-20.
7. *Ditto v. David Threipland*, eldest son of Sir David Threipland of Fingask, entered 18th Dec. 1719, decided 14th March 1719-20.
8. *Ditto v. Sir James Stewart* of Goodtrees, entered 18th Dec. 1719, decided 14th March 1719-20.
9. *Ditto v. Arthur Balfour*, eldest son to Colonel John Balfour, and the creditors of the deceased Robert Lord Burleigh, entered 18th Dec. 1719, decided 14th March 1719-20.
10. *Ditto v. James Lord Bargany* and his guardians, *Robert Dundas* of Arnistoun, one of the Senators of the College of Justice, and *John Jolly*, Merchant in Edinburgh, entered 18th Dec. 1719, decided 14th March 1719-20.

11. *Ditto*

11. *Ditto v. Hugh Wallace* of Inglestoun, entered 18th Dec. 1719, decided 14th March 1719-20.
12. *Ditto v. Alexander Baine*, Advocate, entered 18th Dec. 1719, decided 14th March 1719-20.
13. *Ditto v. Donald M'Donald* and *John Stewart* of Grantully, entered 18th Dec. decided 14th March 1719-20.
14. *Ditto v. Patrick Earl of Marchmont*, entered 18th Dec. 1719, decided 14th March 1719-20.
15. *Ditto v. Henry Scrimseour*, eldest son of John Scrimseour, late of Bowhill, entered 18th Dec. 1719, decided 14th March 1719-20.
16. *Ditto v. Robert Gordon*, son of William late Viscount of Kenmuire, entered 18th Dec. 1719, decided 14th March 1719-20.
17. *Ditto v. Alexander Earl of Home* and *Anne Countess Dowager of Home*, entered 18th Dec. 1719, decided 14th March 1719-20.
18. *Ditto v. Harie Maule* of Kellie, entered 21st Dec. 1719, decided 14th March 1719-20.
19. *Ditto v. John Forbes*, Advocate, entered 21st Dec. 1719, decided 14th March 1719-20.
20. *Ditto v. John Preston*, only son of the late Sir John Preston, Bart. entered 21st Dec. 1719, decided 14th March 1719-20.
21. *Ditto v. John Gordon*, son of Alexander late Viscount Kenmuire, entered 21st Dec. 1719, decided 14th March 1719-20.
22. *Ditto v. Colin Mackenzie*, Advocate, entered 21st Dec. 1719, decided 14th March 1719-20.
23. *Ditto v. Lady Mary Hamilton* of Baldoon, entered 22d Dec. 1719, decided 14th March 1719-20.
24. *Ditto v. Charles Craigengelt*, entered 20th Dec. 1719, decided 26th March 1719-20.
25. *Ditto v. William Martin* of Harwood, entered 18th Dec. 1719-20, decided March 1719-20.

The following appeals were also decided in the period comprehended in this volume; but are not reported, because the printed cases were not found in any collection searched for that purpose.



26. *The Commissioners and Trustees of the forfeited Estates v. Donald Mackenzie of Kilcowie*: this appeal, (entered 21st Dec. 1719), was brought from "an interlocutory sentence or decree of the Lords of Session in Scotland of the 3d of September 1719."

Judgment 13th January 1720-1.—After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentence or decree therein complained of be affirmed.*

27. *The Commissioners and Trustees of the forfeited Estates v. John Earl of Ruglen*: this appeal (entered 25th March 1724) was brought from "a decree of the Court of Delegates in Scotland, made the 6th day of March 1724, praying that the same might be reversed, and that the judgment and decree given by the appellants the 17th of October 1720, might be affirmed."

Judgment 12th Feb. 1724-5.—Counsel for the appellants only attending, they were called in and heard, and withdrew; and due consideration being had of the merits of this cause, *It is ordered and adjudged, that the decree of the Court of Delegates complained of in the appeal be reversed; and that the judgment and decree of the Commissioners and Trustees of the forfeited Estates be affirmed.*

28. *The Commissioners and Trustees of the forfeited Estates v. George Maclain Portioner of Preston*: this appeal (entered 26th March 1724) was brought from "a decree of the Court of Delegates in Scotland, made the 9th day of March 1724, praying that the same might be reversed, and that the decree and judgment given by the appellants the 17th of August 1719 might be affirmed."

Judgment, 12th Feb. 1724-5.—After hearing counsel, *It is ordered and adjudged, that the decree of the Court of Delegates complained of in the appeal be reversed; and that the judgment and decree of the Commissioners and Trustees of the forfeited Estates be affirmed.*

29. *Gabriel Napier Writer in Edinburgh v. Peter Napier of Napierstown and Margaret his wife*: this appeal (entered 28th Jan. 1725-6) was brought from "several interlocutors of the Lords of Session in Scotland, of the 10th and 20th of November 1722, the 25th and 28th of June, the 20th of November, and 13th of December 1723, and an interlocutor of the 11th of July 1724."

Judgment, 12th Feb. 1724-5.—After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentences therein complained of be affirmed; and it is further ordered, that the appellants*  
do

*do pay or cause to be paid to the respondents the sum of 80l. for their costs in respect of the said appeal.*

During this period 219 appeals from Scotland appear to have been entered, of which number there were

Judgments affirmed	78
————— reversed or altered	62
————— annulled (as noticed in the Appendix)	25
Appeals withdrawn or dismissed	50
————— remaining on the roll 15th May 1727	4

# I N D E X

## OF THE

## PRINCIPAL MATTERS

CONTAINED IN  
THIS VOLUME.

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- ACCESSORIUM sequitur principale. See King's annexed Property*  
No. 55. p. 254.
- AB of Parliament 1693, c. 9.* The accounts of a magazine keeper, taken and verified in terms of this act, needed not be verified anew before the Court of Session. No. 14. p. 43.
- 1 G. 1. c. 20. See *Forfeiture for Treason*, No. 59. p. 274. No. 65. p. 298. No. 71. p. 331. No. 72. p. 335. No. 73. p. 337. No. 79. p. 349.
- 1 G. 1. c. 20. and 50. A person's liferent escheat was granted away, for not complying with the act 1 G. 1. c. 20. He was afterwards attainted of treason under the act 1 G. 1. c. 50. This last act declared that all estates of which the forfeiting person was in possession, prior to a certain period, should be vested in his majesty, and that every grant made by his majesty of any part of such estate should be void: the grant of the liferent escheat made within this period was valid, notwithstanding the provisos of the last-mentioned act. No. 53. p. 241.
- 4 G. 1. c. 8. Construction of a special proviso therein, relative to a gift of escheat in favour of Simon Lord Lovat. No. 53. p. 241.
- 5 G. 1. c. 22. This act having limited a certain time for presenting exceptions to the Court of Session against a forfeiture, a person who presented his exceptions in one character could not, after expiration of the time limited, reply in another character, though he held both. No. 57. p. 263. No. 61. p. 280.
- Adjudication.* A charge was given to a son to enter heir to his uncle and mother, and adjudication was had thereon; but the father being found to be liar, this first adjudication was reduced. No. 27. p. 99.
- A son refusing to subject himself to his father's debts, had no title to impugn an adjudication of his father's fee. *Ibid.*
- The court, in a case considered to be doubtful, having sustained an adjudication for the principal sum and interest, *without all accumulation, penalties, and expences whatsoever*; the adjudication being confirmed upon appeal, the latter part of the judgment of the court was reversed. No. 48. p. 211.

*Adjudication.*

In an action of mails and duties brought by an adjudger, the defender made various objections to the adjudication as irregular, and overpaid; upon the adjudger finding caution to repeat over-payments, these objections were repelled, leaving to the defender his remedy by declarator. No. 122. p. 531.

*Aliment.* A father granted a bond of provision to a younger son, in a certain sum, binding himself and his heirs to aliment him till 21, or to pay interest on the bond: the mother married a second husband, and in her marriage contract stipulated for a power of alimentering her said younger son, out of her jointure from her first husband: in an action by the assignee of the said younger son against his eldest brother for interest, as not having been alimented by his father's heirs, such interest was decreed for, and the mother was found to have alimented the younger son *gratis*. No. 137. p. 611.

*Annual-rent.* Two tradesmen having contracted to clothe a regiment, and to divide equally, under a penalty, the sum to be received by virtue of an assignment of off-reckonings; one got possession of the whole sum, and being decreed by the Court of Session to refund to the other, but without interest, the judgment was reversed, and the respondent ordered to repay with interest from the time of receiving the money. No. 36. p. 147.

Aliments to children were to be imputed to the rents of the years in which they were paid, and not to be deducted out of the annual-rents due by a factor. No. 85. p. 380.

A loan of money agreed to be repaid by a certain day, bore interest after that day, though no interest was stipulated for: exchange and re-exchange, which the borrower agreed to pay, also bore interest from the day of payment. No. 131. p. 582.

In a decree for payment of a certain sum, part was distinguished as principal bearing interest, and part as interest only. *Ibid.*

See *Factor*, No. 85. p. 380.

*Appeal.* Appellants not appearing on the day appointed for hearing, their appeal was dismissed with costs. No. 5. p. 11.

An appeal competent, though objection made that it involved the sentence of a presbytery. No. 6. p. 12.

An appeal competent from a decree in 1698, and interlocutor in 1708, though objection made, that a decree in 1707, confirming that in 1698, was not appealed from. No. 7. p. 16.

In the case of an appeal brought for delay, the respondent was found entitled to such interest as he might have entitled himself to, by registering the horning, had he not been restrained by the appeal. No. 17. p. 59.

Decrees of the *Court of Justiciary* reversed upon appeal. No. 20. p. 69.

In an action of declarator of trust, decree was given holding the defender as confessed upon an account of charge and discharge given in by the pursuer; and he was ordered to denude. Afterwards, upon the defenders' application, the Court allowed him ten days longer to give in his accounts; but before the expiration of these ten days he brought his appeal against certain interlocutors, and amongst others against the interlocutors holding him as confessed, and ordering him to denude. After the determination in the first appeal, the defender applied to the court to have liberty to give in his accounts in ten days, as allowed by the interlocutor before the appeal; but it was found, that

*Appeal.*

that his right was extinguished, and he was ordered to denude in terms of the decree affirmed by the House of Lords. No. 92. p. 409.

The Court of Session having refused to put Mr. Haldane (who had obtained the King's letter of appointment as an ordinary Lord of Session) upon trial for what the Court deemed want of due service, as an advocate, an appeal lay from that determination of the Court. No. 95. p. 422.

Interlocutors reversed, and an agreement relative thereto adjudged, *of consent*. No. 107. p. 471. No. 130. p. 577.

A pursuer who had prevailed in a reduction of certain bonds, craved that they might be delivered up to him by the clerk, but the defender having stated that he meant to appeal, and the Court having ordered the bonds to remain in process, and not to be delivered up without a fresh warrant, their judgment was affirmed. No. 127. p. 558.

*Arbitration.* On a day appointed by two arbitrators for determining a matter submitted to them, one of them declined to act, and the overman thereupon pronounced an award: the Court having reduced this award as incompetent, the judgment was reversed. No. 87. p. 391.

*Art and Part.* See *Spunkie*, No. 96. p. 431.

*Assignment.* See *Foreign Deeds*, No. 1. p. 1.

*Battery pendente lite.* Circumstances inferring this crime: though decree taken in the civil action, recourse might also be had to the penal. No. 16. p. 55.

- *Bona fide Consumption.* A superior being in possession by a declarator of non-entry, and found not to be obliged to admit an university for his vassal, but such proper person as they should nominate, was nevertheless obliged to account for the rents since the charter was offered to him by the university, he having deduction of his casualties, as if the old vassal had then entered. No. 40. p. 172.

An adjudication obtained in 1678, having been found to be extinguished by receipt of rents; in a subsequent action of count and reckoning, the Court having found the defence of *bona fides* sufficient to liberate till the date of the interlocutor, finding the adjudication compensated, and that the defenders were not put in *mala fide* by the citations and arrestments, the judgment was reversed, and they were ordered to account from the date of the arrestments used at commencement of the previous action. No. 91. p. 405.

*Bona fide payment.* A purchaser at a judicial sale having paid a *bona fide* debt to creditors ranked before him; in accounting to creditors who were prior to both, had allowance of such *bona fide* payment, but action of repetition was reserved to the prior creditors. No. 69. p. 317.

*Burgh Royal.* The Court of Session having found that the butchers of Edinburgh should be restrained from rinding tallow for sale, and that the magistrates could oblige them to sell their tallow at a certain price to the candlemakers, which was in terms of a bye-law of the magistrates, ratified by a private act of parliament, the judgment was reversed. No. 31. p. 124.

It was a relevant ground to annul an election of magistrates, that the provost had unwarrantably imprisoned some of the electors, during the time of the election, with an intention to prevent their giving their votes at that election. No. 102. p. 452.

*Butchers.*

**Butchers.** The act of parliament 1540, c. 123. forbidding butchers to rind or melt tallow, found to be in desuetude. No. 31. p. 124.

**Cautioner.** A person who had, without confirming, intromitted with his father's effects, which were left to him by will for payment of debts, was upon application of the creditors ordained to intromet with the effects upon inventorying the same, and finding caution to make the same forth-coming; he accordingly found caution, and upon a subsequent application for summary intromission with some of the effects, the Court refused the same, and ordained him to confirm the testament and prosecute in common form; but he neither inventoried the effects, nor confirmed the testament; the cautioner was liable for the whole goods intromitted with. No. 42. p. 183.

*Vide Solidum et pro rata*, No. 105. p. 465.

**Clause.** An estate was entailed by a person to himself in liferent, and to his eldest son and the heirs male of his body, whom failing to the entailor himself, whom failing to his second and third sons, &c., whom all failing to the entailor's nearest heirs and assignees: another estate was entailed to the second son of the former entailor, and the heirs male and female of his body, whom failing to the said former entailor, and his heirs male of tailzie and provision in the former entail: after failure of the institute in the second entail, and the heirs male, and female of his body, the heir male of the first entailor succeeded to the estate contained in the second entail. No. 21. p. 76.

The Court of Session having found, that the irritancy of the contravener's right in the entail of Reccarton did only respect the heirs female, and not the heirs male, their judgment was reversed. No. 29. p. 110.

A minister who was also patron of his parish, having been deprived of his benefice by the presbytery, conveyed his right of patronage to a purchaser, reserving his own right as minister, or preacher; the Court having found that the dispoinee had not the right of presenting during the grantor's lifetime, the judgment was reversed. No. 81. p. 364.

The grantor of a deed obliged himself and his heirs male, and of tailzie, provision, &c. upon failure of heirs male of his own body, and heirs male of the descendants of his body, to resign the lands for infeftments to his daughters, and the heirs male of their bodies without division, &c.; in a competition between the heir male of the body of his eldest daughter, and a person claiming as heir male of the descendants of his body, the former was preferred. No. 129. p. 564.

**College of Justice.** Mr. Haldane, who had been a member of the faculty of advocates for seven years; but who, by being a member of parliament, and a commissioner for the forfeited estates, during great part of that time, did not then attend in the college of justice, was nevertheless qualified to be a Lord of Session. No. 95. p. 422.

**Compensation.** In a suspension, the suspender's plea of compensation was rejected. No. 54. p. 249.

A bond granted by the Earl of Panmuir was conveyed to an onerous assignee on 21st April 1716; by an act of parliament passed on 7th May 1716, his lordship was attainted of treason from November 1715. The original holder of the bond in January 1717 acknowledged, upon oath, that he had purchased in April or May 1716, from Lady Panmuir, as her husband's attorney, a quantity of grain, and had paid her the price. The trustees for forfeitures found, that the bond was compensated against the assignee, and that an arrestment

*Compensation.*

used against the debtor on 9th May 1716, and a horning signeted on 26th October thereafter, were no sufficient intimation of the assignment; but their judgment was reversed by the court of delegates, and such reversal affirmed on appeal. No. 82. p. 368.

*Costs of Appeal and Expenses of Process.* 5*l.* costs given to one of several respondents. No. 4. p. 8.

4*ol.* given against appellants who did not appear on the day appointed for hearing, *though no recognizance had been entered into.* No. 5. p. 11.

Directions given to the Court of Session (on petition) how to levy these costs. *Ibid.*

Expences of the court below given to an *appellant.* No. 8. p. 19.

Proceedings on the mode of ascertaining the amount of these expences. *Ibid.*

4*ol.* costs given against an appellant, a minor. No. 10. p. 28.

Expences of the court below given against a respondent. No. 14. p. 43.

4*ol.* costs given against an appellant. No. 16. p. 55.

Ditto ditto. No. 17. p. 59.

3*ol.* ditto. No. 33. p. 134.

Two tradesmen having contracted to clothe a regiment, and to divide equally, under a penalty, the sums to be received by virtue of an assignment of off-reckonings. One got possession of the whole, and being sued by the other, whose claim was restricted to a smaller sum than demanded, he was decreed by the court to refund, but without expences: on appeal, the judgment was reversed, and the court was ordered to cause the expences of the appellant to be taxed and ascertained, and forthwith paid by the respondent. No. 36. p. 147.

The appellant having complained by petition that the Court of Session had not caused his expences to be taxed and ascertained, and paid to him in terms of the judgment of the House of Lords, proceedings thereon:—a sum allowed to the complainant for his subsequent expences in taxing the expences formerly awarded. *Ibid.*

A person having right to the balance of the price of an estate, which price was stipulated for in an agreement with penalty, obtained decrees in several actions for principal and interest; and in the last of these actions insisted for expences of all the former actions; the court having refused to grant these expences; on appeal the judgment was reversed, and the court was ordered to cause the expences of all the actions to be taxed and paid to the appellant. No. 37. p. 154.

Subsequent proceedings on two complaints by the appellant, that the court had not taxed such expences: the House, by a committee, taxed the expences of the court below, and costs of these two complaints, and ordained the same, amounting in all to 6*l.* 1*l.* 4*s.* 4*d.* to be paid by the respondent, a minor, and his tutors and curators. *Ibid.*

Expences of the court below, and 3*ol.* costs of appeal given to an *appellant.* No. 40. p. 172.

3*ol.* costs given against an appellant. No. 41. p. 178.

4*ol.* Ditto No. 42. p. 183.

Ditto ditto No. 47. p. 209.

Ditto ditto No. 52. p. 234.

2*ol.* Ditto No. 54. p. 249.

*Costs of Appeal and Expenses of Process.*

60*l.* costs given against an appellant. No. 55. p. 254.

30*l.* Ditto No. 59. p. 259.

60*l.* Ditto No. 69. p. 317.

An heir having succeeded against a person, in the place of a judicial factor, in an action of removing and in a count and reckoning, but not to the full extent of his claims, the Court refused him his expences: but their judgment was reversed, and they were ordered to cause the expences and damages of the appellants to be taxed and ascertained according to the regulations, when defenders are litigious, and when so ascertained to be forthwith paid to the appellants. No. 85. p. 380.

Upon complaint to the House of Lords that they had not caused these expences and damages to be taxed pursuant to said order, the House, by a committee, taxed the expences at 640*l.* which sum they ordered the respondent forthwith to pay. *Ibid.*

In an action relative to the commencement of *mala fides*, the Court having found that the same did not commence from the date of citation and arrestment, but from the date of the decree in a former action, and refused the pursuer his expences in both; on a reversal of the judgment on appeal, it was ordered that the Court should tax and ascertain the expences in the last action, and that the same should be then paid to the appellant. No. 91. p. 405.

The appellants having failed to appear on the day appointed for hearing, the respondents were heard, and the judgment affirmed with 100*l.* costs. No. 96. p. 431.

One of the defenders in a spuilzie, who was an officer in the king's service during the rebellion, being assilzied, petitioned for his expences, which were refused by the Court; but the judgment was reversed, and the Court was ordered to tax and ascertain these expences. No. 108. p. 477.

20*l.* costs given against an appellant. No. 110. p. 488.

40*l.* costs given to one of the respondents. No. 112. p. 499.

Trust bonds granted conditionally, if the grantor should procure two commissions held by the grantee, in consequence of resignations which he then executed, were reduced upon the ground, that though the grantor held the resignations in his hands, he did not procure the new commissions in virtue thereof, but in consequence of other means and considerations; but the Court having refused the pursuer his expences, the judgment was reversed, and the Court was ordered to cause these expences to be taxed and ascertained, and forthwith paid to the pursuer. No. 127. p. 558.

50*l.* costs given against an appellant, executrix of the person against whom the interlocutors were pronounced. No. 128. p. 561.

50*l.* costs given against an appellant; subsequent proceedings relative thereto; and an order made to pay by a day certain, before escheating the recognizance. No. 131. p. 582.

5*l.* costs given against an appellant who had deserted his appeal. No. 132. p. 500.

60*l.* costs given against an appellant. No. 136. p. 607.

80*l.* Ditto No. 137. p. 618.

*Courtesy.* An heiress's infestment, reduced after her death for informality, but not challenged in her lifetime, was sufficient to support the courtesy. No. 44. p. 192.



*Courtesy.*

An heiress being reponed against certain deeds executed by her when a minor, with consent of a major husband, on the ground of minority and lesion; after her death such consent excluded the husband's courtesy. No 78. p. 346.

*Creditors of a Defunct.*—*Ab of Sederunt*, 1662. After the expiration of six months from the death of a debtor, one creditor cited the executor in an action of constitution on the 18th of June, and on the same day the executor cited that Creditor, and another, to whom the deceased had given a general assignation of rents, &c. in a multiple poinding; this general assignee afterwards, on the 27th of June, cited the executor in an action of constitution; the creditor giving the first citation also got the first decree of constitution, and was by the Court preferred to the other; but the judgment was reversed and both were preferred *pari passu*. No. 109. p. 483.

*Death-bed.* The Court having found that death-bed could be pleaded by an heir cut off by two prior deeds, and that it could be pleaded by creditors; their judgment was reversed. No. 111. p. 493.

Did contracting the sickness, at the time of executing the deed, constitute death-bed? *Ibid*.

A minor, with consent of his curators, could not gratuitously, on death-bed, alter the settlements of his estates. No. 129. p. 564.

*Deed see Writ.*

*Depositum.* The depositary of a South-Sea subscription was warranted in paying money and accepting stock, as the principal must have done in terms of an act of parliament. No. 131. p. 582.

*Escheat.* An act of parliament at the time of the rebellion in 1715, having ordained persons summoned by the crown to appear before the Court of Justiciary, and find caution for their good behaviour under the pain of liferent escheat, &c.; and the liferent escheat of a person failing to appear, having been adjudged and granted to a donatory; though there was no previous declarator, the rents were ordered to be paid to the donatory; but the creditors who were real at the time of the falling of the escheat, were ordered to be charged on the estate in due course of law. No. 53. p. 241.

An estate having been settled by entail upon a person in liferent, and a certain series of heirs in fee, with the burden on the liferenter of an aliment to the first substitute; the liferenter forfeited his liferent escheat for treason; the Court of Session, in a competition with the donatory of escheat, having granted an aliment to the heir, their judgment was reversed. No. 101. p. 449.

A father conveyed his estate to a trustee for certain purposes; after the father's death, the trustee sold part of the estates, and bond for the price was taken in the name of the truster's son, who of same date granted a back-bond to the trustee in terms of the father's trust deed; the son was afterwards denounced for treason, and his escheat granted to a donatory; but he subsequently granted an assignation to his father's trustee, which in a competition with the donatory was sustained. No. 135. p. 607.

The donatory having consented to a decree of preference to children for their provisions, and having contended that this consent did not extend to creditors, who were preferred to the children, and petitioned to be heard against them, the petition was refused. *Ibid*.

*Expenses, vide Costs of Appeal, and Expenses of Process.*

*Factor.* A person who had become surety for a judicial factor, and afterwards had a deputation from him, could, by no right acquired during the factory, invert the heir's possession; nor could he retain possession till his claims were paid, but was to sue for them as accords. No. 85. p. 380.

He was found liable in terms of the act of federunt, 31st July 1690, in annual-rent for what he received, or might have received, within one year after the same grew due:—He was entitled to no factor-fee, having disturbed the possession of the factor by virtue of other rights and titles in his person. *Ibid.*

A foreign factor having advised his correspondents that he had disposed of a cargo, and shipped returns for it, on both of which he charged commission; he afterwards brought an action against the correspondents, alleging that he had sent his own goods, and had not received proceeds for them; but he was not allowed to prove facts contrary to his correspondence. No. 123. p. 534.

The knowledge of the shipmaster, though super-cargo and part owner, was not relevant against this correspondence. *Ibid.*

*Falsa Demonstratio.* Major-General Thomas Gordon, Laird of Auchintoule, was attainted by act of parliament; and the commissioners of forfeitures seized the estate of Alexander Gordon, whose description agreed in every thing with the attainted person's, except the christian name; but upon exceptions taken to the Court of Session, the seizure was annulled. No. 60. p. 278.

The attainder and forfeiture of Alexander Farquharson did not affect a person of the same surname and description, but bearing the christian name of Patrick. No. 74. p. 340.

*Fiar.* An estate being settled by an heiress to her husband and herself in conjunct fee and liferent, and the heirs to be procreated between them in fee, whom failing to the husband, his nearest lawful heirs and assignees, the husband was fiar. No. 27. p. 99.

The proprietor of an estate burdened with apprisings, dying, left two sisters, whose husbands entered into a submission for themselves, and as taking burden upon them for their wives, with a person who had or appeared to have right to these apprisings; by the decree arbitral they were decreed to be conveyed to the husbands and their wives, the husbands paying the price; the wives were fiars of these apprisings. No. 35. p. 144.

A house, part of the conquest of a first marriage, was disposed to a person and his wife in conjunct fee and liferent, and to the heirs of the marriage in fee, whom failing to the heirs of the husband; the husband being fiar might settle the liferent thereof on a second wife. No. 90. p. 399.

See *Forfeiture for Treason.* No. 76. p. 342.—No. 77. p. 345.  
*Fiar absolute, limited.* In a son's marriage contract, it was covenanted on the part of the father that lands and hereditaments of a certain annual value were to be settled and assured, so as the same should come to and be vested in the eldest son of the marriage, and other lands and hereditaments to remain to the son's use, reserving the father's liferent of part; the son was fiar, and by his bond bound the heirs of the marriage. No. 70. p. 324.

A father granted an absolute disposition to his son, which was not completed by infeftment, or by making up schedules in terms thereof; the son afterwards joined with the father in making two new settlements of the estate, and the father, who still continued in possession, granted

*Fiar absolute, limited.*

granted a disposition to a third party after the son's death; the Court having found that these posterior dispositions were not to be of prejudice to the son's creditors, the judgment was reversed. No. 111. p. 493.

A clause of return to the grantor of a deed, after failure of heirs male, did not disable the heir male in possession gratuitously to alter in favour of his daughters. No. 129. p. 564.

Nor did a simple destination to heirs male in several prior deeds hinder this. *Ibid.*

*Fiar and Liferenter.* The Court of Session having found that a *fiar* had the right to cut and sell woods growing on part of an estate that was *liferented*, the judgment was reversed. No. 100. p. 443.

An estate was entailed upon a person in *liferenter*, and a certain series of heirs in *fee*, with the burden on the *liferenter* of an aliment to the first substitute; the *liferenter* having forfeited his *liferent* escheat for treason, and the Court of Session having, on a competition with the donatory, granted an aliment to the *fiar*, their judgment was reversed. No. 101. p. 449.

*Foreign.* A person residing in London brought an action on a promissory note in Scotland, against which usury was pleaded but repelled; the clerk was ordered to retain the note in court, till the pursuer should transfer to his agent in Scotland a collateral security in stock, which had been granted by the defender. No. 115. p. 511.

*Foreign decree.* A judgment of the Court of King's Bench having been recovered by the administratrix of a copartner in a trading company against the cashier, and being sued on in the Court of Session, this judgment was sustained, the pursuer instructing that his father was a copartner, and that the defender was cashier, and had intromission to make him liable. No. 38. p. 162.

*Foreign Deeds.* An assignment of a bond (both being executed in England, and in the English form) intimated by letter only, found to be preferable to a posterior arrestment. No. 1. p. 1.

The judgment finding that the law of Scotland should regulate this case, was reversed. *Ibid.*

It was no nullity in a bond that it was executed in England in the Scotch form. No. 112. p. 499.

*Forfeited Estates, Commissioners for the.* By several acts of parliament, the claims relative to forfeited estates were to be entered before the commissioners by a day certain; in certain cases application was to be made to the Court of Session. A person mistaking his remedy, applied to the Court of Session and obtained a judgment in his favour; but that was afterwards (among others) annulled by the House of Lords, for want of jurisdiction: he then entered a claim before the trustees which they refused to consider, as not having been entered within the time limited; and an appeal to the Court of Delegates was also refused, "leaving the petitioner in his circumstantial case, to make application for redress to the proper powers." The judgment of the Court of Delegates was affirmed. No. 114. p. 507.

Claims upon the estate of an attainted person, which had reverted to a loyal superior, did not fall under this jurisdiction, but remained to the ordinary courts. No. 122. p. 531.

*Forfeiture.* An estate being forfeited during the usurpation, a *bona fide* creditor of the then government, had been paid his debt by a grant out of the estate; on the restoration of the estate, the heir of such grantee was not obliged to refund. No. 25. p. 91.

*Forfeiture for Treason.* Of a papist. No. 57. p. 263.

The act 1 G. 1. c. 20. having given to subject superiors the forfeited estates of their vassals; the Earl of Linlithgow being attainted, forfeited to the Duke of Hamilton a mill, held of his grace as superior; but the earl having thirled part of his estate held of the crown to this mill, this thirlage was not forfeited to the Duke of Hamilton. No. 59. p. 274.

The attainted vassals of a trustee for a papist, who was also attainted, did not forfeit their estates to the protestant heir, who claimed them as remaining loyal under 1 G. 1. c. 20. but to the crown. No. 61. p. 280.

A disposition was made by a father in 1713, to a son then a few months old, of his estate, reserving power to sell or incumber part for debts already contracted, &c. with concurrence of trustees, and reserving the grantor's liferent; in 1714 the father renounced this liferent. By his attainder for treason in 1715, the estate was not forfeited, being vested in the son. No. 64. p. 290.

A father executed an entail in favour of his son; the son being incest base, was attainted for treason; the procuratory of resignation to the crown not having been executed, the Court under an act of parliament declaring that the estates of *vassals* attainted were to go to superiors continuing *loyal*, adjudged the estate to the father; but their judgment was reversed upon appeal. No. 65. p. 298.

An act of parliament, passed on the 7th of May 1716, enacted, that the persons therein mentioned should, under pain of attainder, surrender themselves to a justice of the peace, by a day certain. A person who had surrendered by letter to the commander in chief, before the passing of the act, and was directed to proceed to a place appointed, but who, it was alleged, was prevented by indisposition, and who never surrendered to a justice in terms of the act, was nevertheless held to be attainted for treason. No. 67. p. 307.

The act 1 G. 1. c. 20. gave to vassals continuing loyal a right to hold their lands, &c. of the crown, in the same manner as they were held by the superior forfeited for treason; but vassals in church lands, who had not claimed the benefit of the acts 1633 and 1661, annexing the superiorities of church lands to the crown, and had paid their feu duties to a subject superior without receiving any new investiture from him, were not on the superior's attainder entitled to the benefit of the said act 1 G. 1. c. 20. but found to hold of the crown, on payment of the same feu-duties, &c. as paid to the forfeiting person. No. 71. p. 331.

The act 1 G. 1. c. 20. having enacted that the lands of those guilty of high treason, which were held of subject superiors, should recognise and return into the hands of the subject superior who continued loyal; John Grant, an attainted person, held his lands of Alexander Mackenzie as his immediate superior: this Alexander was also attainted, and he held of Lord Roystoun as his superior, Lord Roystoun holding of the crown: on Grant's attainder, his property did not go to Lord Roystoun, but to the crown. No. 72. p. 335.

The act 1 G. 1. c. 20. gave to superiors continuing dutiful and loyal, the estates of attainted vassals; to a superior claiming the estate of his vassal, it was objected, that he had corresponded with the Pretender, entertained him at his house, and given him a present of plate: the Court of Session, on the 29th of October, two days before their powers as to exceptions on the forfeited estates expired, granted the  
objectors

*Forfeiture for Treason.*

objectors a proof; and no proof having been adduced, on the 31st, circumvented the term against them, and decerned in favour of the claimant. No. 73. p. 337.

A trust estate was forfeited by the treason of the person for whom the trust was created, though a disposition of the estate had been granted by the trustee, to which the truster was not a party. No. 75. p. 341.

A crown vassal in 1707 fold and disposed his estate to an onerous purchaser, with procuratory of resignation, and other usual clauses, and the price was paid; the crown vassal in 1715 was attainted for treason, and the purchaser, who had not previously completed his title by infestment, made resignation, and took infestment on a charter from the crown: the estate was not forfeited by the attainder of the seller. No. 76. p. 342. No. 77. p. 345.

The acts relative to forfeiture for treason having saved the rights of creditors innocent, dutiful, and loyal, a claim on a forfeited estate by virtue of a personal bond, (which had been given up in the inventory by the claimant, when confirmed executor to his father) was made by a person who had been confined in prison on suspicion of treason, but liberated without trial; this claim was rejected by the commissioners of inquiry and Court of Delegates, but their judgment was reversed. No. 79. p. 349.

See *Compensation*, No. 82. p. 368.

*Forum competens.* The Marchioness of Annandale residing in England, having been appointed by her husband executrix for behoof of her children, proved his will in that country: various personal creditors of the late Marquis having arrested in the tenants' hands a jointure payable to the executrix out of the Scots estate, and the Court having ordered her to purge the arrestments before she drew her jointure, the judgment was reversed, and it was ordered that the arrestments should be loosed without caution or consignment. No. 106. p. 467.

*Fraud, and Circumvention.* In a reduction of sundry deeds upon this ground, various circumstances found irrelevant or not proved. No. 13. p. 41.

Circumstances sufficient to reduce deeds upon this ground. No. 15. p. 47.

Being so reduced, they stand as a security only for the onerous cause thereof. *Ibid.*

A creditor pursuing a judicial sale, entered into a contract, before the sale, to sell to a third party at a certain sum; he afterwards at the sale purchased for a smaller sum, but was obliged to account for the larger sum, which had been paid to him in terms of the prior contract. No. 69. p. 317.

*Funeral Expenses.* In a question between the heir, and the assignee of the executrix of a Lord Justice Clerk, 250l. being modified as sufficient for funeral expenses, the judgment was reversed. No. 11. p. 32.

See *Prescription*, No. 18. p. 61.

*General Assignment.* A general assignment of a man's personal estate, made in favour of one who had, without the husband's knowledge, during the marriage, granted a bond to the wife, blank in the creditor's name, did not release this bond. No. 58. p. 269.

An assignment by a debtor to a creditor of as much of the first and readiest of the rents of his lands that should happen to be due to him

*General Assignment.*

at the time of his decease, as would satisfy and pay a certain sum, gave no preference in a competition of creditors after the debtor's death. No. 109. p. 483.

*Hereditas jacens.* See *Prescription*, No. 129. p. 564.

*Heritable and moveable.* A father in 1641, on his eldest son's marriage, settled an estate upon him and the heirs thereof, reserving a power to burden; the son was infest, and half the marriage portion paid to the father; but the wife dying without issue within year and day, the father granted bond to the son to employ the same for his benefit, or to restrict his power of burdening *pro tanto*. The eldest son also dying, the father settled the estate on the second son, who granted heritable securities to creditors, upon which infestments were taken in 1666, and appraisings in 1670. His son having taken up the succession as heir to his uncle, at the instance of creditors the contract of marriage and infestment were reduced, but with a clause that the half of the marriage portion which had been paid should be a *real* burden on the estate. In a competition between the person having right to this half of the marriage portion, and the person entitled to the infestments of 1666, and appraisings of 1670, the Court having preferred the former, the judgment was reversed. No. 39. p. 167.

A bond taken to a man and his wife in liferent, and to their daughter in fee, and failing her by decease, to the husband, his heirs, executors, or assignees, found to be moveable, that being but one substitution. No. 49. p. 216.

*Holograph.* Whether holograph or not being referred to the oath of the grantor of a bond, the term was circumduced against him for not deponing. No. 47. p. 209.

*Homologation.* In a reduction of a tack on the ground of nullity, it was found by the Court that the receipt of rent by the grantor's heir for more than 30 years imported no homologation; but the judgment was reversed. No. 12. p. 37.

A person against whom a judgment had been recovered in England was surrendered by his bail, who were released; he thereupon executed an instrument purporting that the judgment by such discharge should not be released. This instrument did not homologate the judgment. No. 38. p. 162.

A person disposed his estate to his son burdened with payment of his debts; the son sold to an onerous purchaser, who being sued by the assignee of two bonds granted by the father, objected nullity to these bonds. It was alleged that the grantor of the bonds had homologated the same by payment of interest, &c.; the Court found that such alleged homologation did not hinder the defender from questioning these bonds. No. 83. p. 372.

A payment to account by the grantor of a bond, after an irritancy thereof incurred, was found in an action against the cautioner for the grantor, to be no homologation or passing from the resolute clause. No. 122. p. 590.

*Husband and Wife.* During the subsistence of a marriage a wife and her sister having equal right to a bond, conveyed the same to the husband. He afterwards made his will, appointing his wife executrix, and universal legatee, for behoof of the grandchildren. After the death of the husband, the grant formerly made by her to him was not revocable, as a *donatio inter virum et uxorem*. No. 41. p. 178.

A bond

*Husband and Wife.*

A bond with a clause of annual-rent was granted blank in the creditor's name, and delivered to a wife during the subsistence of her marriage; the husband entailed his real estate on the grantor of the bond, and also conveyed to him all his personal estate, but was not privy to said bond: in a competition between the executor of the husband and the executor of the wife, the husband's executor was preferred to said bond, and the wife's executor was ordered to refund what had been paid to her in her widowhood. No. 58. p. 269.

A liferent granted to a wife by her son was not restricted by a missive letter, executed by her without her husband's consent, though a decree of declarator in absence had been obtained thereon. No. 64, p. 290.

A minor wife, whose husband was major, was reposed on the head of minority and lesion against certain deeds executed by her with her husband's consent; but such consent of the major husband excluded his *jus mariti* and *courtesy*; though it did not extend to enforce a warrandice of the deeds executed by the wife, to which warrandice he was specially bound. No. 78. p. 346.

A person, in his contract of marriage with his first wife, obliged himself to settle his estate on the heirs of the marriage; by a procuratory of resignation executed in same terms, he reserved power to grant provisions to a second wife and younger children, on which intestament followed; and by a second deed he afterwards restricted his right of granting provision to a second wife and children to the extent of 100,000*l.* Scots: after a second marriage he granted bond to a second wife for an annuity or jointure of 1000*l.* sterling, but made no provision for children of the second marriage. In a question with the heir of the first marriage the second wife was declared to have right to her jointure till she drew thereout the sum of 100,000*l.* Scots. No. 93. p. 412.

See *Legitim*, No. 123. p. 594.

*Implied Discharge.* A father in his son's marriage contract bound himself to settle an estate upon him of a certain annual value; afterwards the son executed a deed, declaring that the estate was not of such annual value, and granted bond to his father to pay, or allow his father to charge, a sum on the estate for provisions to his younger brothers and sisters; the father afterwards granted a disposition to his son in terms of the marriage-contract; but this was not a discharge of the bond granted by the son. No. 70. p. 324.

*Indemnity.* Alleged malversations of the conservator at Campvere held to be remitted by an indemnity. No. 8. p. 19.

*Battery pendente lite* not remitted by this. No. 16. p. 55.

*Inhibition.* By marriage-contract, the husband was bound to resign his estate to himself and the heirs male of the marriage, and inhibition having been used thereon, he was disabled to dispose of that estate gratuitously in prejudice of the heir male of the marriage. No. 15. p. 47.

*Irritancy.* A collector of taxes during Cromwell's usurpation, entered into an agreement with a person who, after the Restoration, had a commission to sue, compound, transact, and agree on the part of the crown; to this commissioner the collector granted bonds for certain sums, and the commissioner obliged himself to deliver to the collector by a day certain, a release from the crown, otherwise the parties were to remain as they were before the bonds were granted: this was no penal irritancy,

*Irritancy.*

irritancy, and was not to be purged, after elapsing of that day. No. 152. p. 590.

*Jurisdiction.* The York Buildings Company, which had purchased large estates in Scotland, was liable to be sued in that country, in a personal action relative to a transfer of stock, though such transfer could only be made in London. No. 120. p. 521.

— *Commissary Court.* This court could not give decrees of preference among competing creditors. No. 85. p. 380.

See *Forum competentis*, No. 106. p. 467.

*Jus Exigendi.* A lady's jointure being secured on certain heritable debts, but no investiture taken, the husband's estate was afterwards forfeited during the *Usurpation*; but being afterwards restored to his heir, reserving the claims of the widow and others, and ordering those to refund, who had received grants out of the estate; the assignee of the widow's executrix had no *jus exigendi* of the sums received under these grants. No. 25. p. 91.

*Judiciary, Court of.* Decrees of that court appealed from, and reversed, together with a judgment of the court of session founded thereon. No. 20. p. 69.

*King's annexed Property.* A person to whom part of the annexed property had been granted, created a heritable security thereon; his own grant was afterwards reduced, and the decree was confirmed by an act of re-annexation; an act of dis-annexation was subsequently passed, and a new grant of part of the premises made to the representative of the family of the original grantee, though not his heir: this did not revive the heritable security granted by him. No. 55. p. 254.

*Kirk Government.* Proceedings against an episcopal minister, before the Toleration Act, 10 Ann. c. 7. who had been imprisoned for exercising his function, reversed on appeal. No. 6. p. 12.

*Kirk—Intrusion into.* The magistrates of Elgin being *pannalled* and convicted in the Court of Judiciary of an intrusion into the parish church, and a fine imposed upon them, the judgment was reversed. No. 20. p. 69.

See *Judiciary, Court of.* *Ibid.*

*Kirk Patrimony.* The superiority of certain church lands, which were purchased from the crown for an onerous consideration, and which were specially excepted in the act 1653, c. 13. "anent regalities of erection," part of the general re-annexing acts, found to be in such purchasers, the vassal having taken charters and investitures from the subject superior for near 100 years. No. 30. p. 118.

In 1631, certain vassals in church lands advanced money to the crown, to assist in redeeming a wadset granted to the Earl of London, the Lord of Erection, upon condition that they should hold of the crown as superior, and have certain other privileges; in 1653, the superiorities of all church lands were gratuitously annexed to the crown; and about the same time vassals who should advance money for redeeming their feu duties were allowed by his majesty to treat with the treasury for that purpose, and to retain their feu duties in proportion to the sums advanced. In a question between the wadsetter, and the vassals, who had advanced money in 1631, it was found that they were not to retain their feu duties, though they had paid money for privileges, the greater part of which had been granted to other vassals gratuitously. No. 66. p. 303.

See *Forfeiture for Treason*, No. 71. p. 331.

*Legitim.* Portions to children in a contract of marriage, if not so expressed, did not exclude their legitim. No. 133. p. 594.

Upon



*Legitim.*

Upon a wife's renouncing her thirds, by the contract of marriage, the division of the personal estate was bipartite, one half legitim, the other half dead's part. No. 133. p. 594.

Provisions to children, in this case, did not come off the whole head of the executry as a debt; but the legitim was first to be imputed in payment of their portions; the rest was to be taken as a debt from the dead's part, if necessary. *Ibid.*

Bonds fall under legitim. *Ibid.*

*Lis Alibi pendens.* A defence of *lis alibi pendens* was repelled, where the pursuer produced an order dismissing his Chancery suit, which was the subject of this defence, and a declaration under his hand, disclaiming all further proceedings in that suit. No. 131. p. 582.

*Litigious.* The assignee of a younger brother sued an elder brother bound to aliment the younger, for interest on his bond of provision; the mother having alimented the younger son *en pietate*, a sum paid by the eldest son to the mother's second husband, and discharge taken for the younger brother's aliment *pendente lite*, did not influence the cause. No. 137. p. 611.

*Member of Parliament.* In an action to reduce the election of certain magistrates of a royal burgh, on account of the imprisonment of certain of the electors by the provost, who was a member of parliament; the provost's privilege of parliament could not be pleaded to stop the declarator against the other defenders, as not elected by a sufficient quorum. No. 102. p. 452.

Neither could the provost's privilege of parliament stop the pursuer from insisting upon the reason of reduction, that some of the electors were unwarrantably imprisoned by the provost. *Ibid.*

*Minor.* A tack, which in the recital bore to be granted by a minor, with consent of curators, but was signed by the landlord only, having been followed by long possession, was sustained. No. 12. p. 37.

A minor, though with consent of his curators, could not gratuitously alter the settlements of his estate. No. 129. p. 504.

See *Husband and Wife*, and *Courtesy*, No. 78. p. 346.

*Minor non tenetur placitare.* The maxim did not bar, in a reduction upon the head of *dole* in the minor's father. No. 10. p. 28.

*Misnomer.* See *Falsa Demonstratio*, No. 60. p. 273. No. 74. p. 340.

*Mutual Contract.* A creditor by adjudication with an unexpired legal, and without infeftment, entered into an agreement with two other creditors, by which he consented that they should be paid before him; in a competition between a singular successor of this adjudger, with notice, and the representatives of those two creditors, it was found that the preference in the contract was perpetual, and that as it concerned a personal subject, on which no infeftment had followed, it was effectual against the singular successors of the grantors. No. 69 p. 317.

At compromising a transaction relative to South-sea stock, one of the parties granted an obligation to the other to pay him a certain sum with this proviso, that whereas the obligee intended to sue two of the directors to make void his own bargain, if he succeeded, the obligor was to be free of his obligation. The obligee having got an abatement by compromise from the directors, the obligor was entitled to a proportional abatement. No. 113. p. 503.

*Mutual*

*Mutual obligation.* A husband having granted a bond of provision in consideration of a disposition executed by his wife, and she having cancelled the disposition, this cancelling dissolved the obligations of the bond. No. 128. p. 561.

*Negotiorum Gestor.* The respondent having sent money by the appellant to be by a third person laid out in stock in the respondent's own name; on the death of this third person, the appellant could not warrantably lay out the respondent's money, in his, the appellant's, own name. No. 99. p. 438.

*Non-entry.* A superior having obtained a general declarator of non-entry against his vassal, his agent, in a subsequent ranking, restricted the superior's interest so as to be ranked posterior to the creditors annual-renters: on a reduction by the superior, on the head of lesion, and absence *reipublicæ causæ*, the ranking was sustained. No. 22. p. 80.

*Patrum Illicitum.* An estate was settled by a father upon his son and his heirs, reserving a liferent to a certain amount, and by the son's marriage-contract the estate was by covenant to be of a certain annual value: two years after the marriage the son declared by a deed that the estate was not worth so much *per annum*, but that this was done to please his wife's friends; and he granted bond to pay, or allow his father to charge a sum upon the estate, for provisions to his younger brothers and sisters, which should be in full of legitim: this was not *contra fidem tabularum nuptialium*. No. 70. p. 324.

*Papist.* An estate held in the name of a trustee for the Earl of Seaforth, a papist, was forfeited to the public by the earl's attainder for treason, and could not be taken up by the protestant heir. No. 57. p. 263.

The act of parliament, 1 G. 1. c. 20. gave to loyal superiors the estates of their vassals attainted of treason; six vassals of a trustee for the Earl of Seaforth, a papist, were attainted. and the Earl himself having been also attainted, these estates were claimed by the protestant heir, to whom they were decreed by the Court of Session, but their judgment was reversed. No. 61. p. 280.

A child, a few months old, though born of popish parents, might take an estate by disposition from his father. No. 64. p. 290.

An estate descended to two heirs portioners; the eldest, a papist, by her first marriage had a son a protestant; in a contract on her second marriage she covenanted to settle the estate on her husband and the heirs male of that marriage. After her second husband's death, the eldest son of that marriage granted a disposition of the estate to a third party, no titles had hitherto been made up by this son of the second marriage, nor by his mother; but the disponent now gave them a charge to enter heirs, and thereupon got adjudication. It was not *jus tertii* to the protestant heir of the first marriage to object against this disposition. No. 125. p. 547.

Papists, on whom the succession to heritable subjects devolved before the act 1700, were nevertheless precluded from serving heirs after that act passed, without taking the formula. *Ibid.*

An onerous purchaser from a papist could not be in a better situation than the papist himself. *Ibid.*

A person *popishly* educated, and who never took the formula, held to be a papist. *Ibid.*

An objection that a question was not moved of the disponent's popery, and that he never took the formula, during his life, was repelled. *Ibid.*

*Papist.*

The act of parliament 3 G. 1. c. 18. did not extend to papists in Scotland. *Ibid.*

*Parent and Child.* See *Tutor and Pupil.* \*No. 68. p. 312.

*Passive Title.* A person granted an entail of his estate to his son, and his heirs male whatsoever, with the burden of his debts. The son granted a back bond in consideration thereof to pay the father's debts: after the death of the father and son, the daughters conveyed the estate real and personal of their father and brother, to a creditor, without making up any title thereto; and the creditor granted bond to protect them from what they had done, and the debts of their father and brother; the heir male of entail having got back the estate, sued the said creditor for debts of the father, as a vitious intrometter, in which he obtained decree; and the Court also found the moveable debts due to such intrometter, to be extinguished; but their judgment was reversed, and the creditor ordered to account for actual intromissions only. No. 124. p. 539.

*Apparent Heir.* One passing by an apparent heir three years in possession, was not liable to implement such apparent heir's gratuitous bond of tailzie. No. 129. p. 564.

*Peer.* An alleged trust referred to the oath of a peer. No. 63. p. 287.

*Penalty.* A bond of provision by a father contained a clause of annual-rent, but no penalty on failure: in an action of damages for not punctual payment of interest, and expences thereon incurred, the defence that the bond contained no termly penalty was over-ruled, and the defender was found liable in damages and expences. No. 137. p. 611.

*Personal and Real.* A disposition was made of an estate to one person in life-rent, and to others in fee, with the burden of payment of the grantor's debts which were not specified; in a competition between the grantee of the life-rent escheat of the life-renter, and the creditors of the grantor of the disposition, the Court found that these debts were *real*, and did affect the estate; but their judgment was reversed. No. 80. p. 355.

A grantor of a deed declared, that if children's portions were not paid in his lifetime, persons whom he named might appoint a factor after his death to receive certain rents, and pay such portions; these portions were real debts affecting the estate. *Ibid.*

A disposition was granted by a father to his son of the paternal estate, burdened with all debts contracted, or to be contracted by the father; in a question between an onerous purchaser of the estate from the son, and an assignee of two personal bonds granted by the said disposer, the Court found that these debts were a *real* burden upon the subject disposed; but their judgment was reversed. No. 83. p. 372.

See *Mutual Contract.* No. 69 p. 317.

*Personal and Transmissible.* A sum appointed by a father to be paid to his son, his heirs, executors or assignees, at a day certain, was transmissible by the son, though he died before that day. No. 70. p. 324.

*Prescription.* Furnishings to a funeral did not form such a continuation of accounts as to bar the triennial prescription of accounts incurred before the death of the deceased. No. 11. p. 32.

The accounts of funeral expences paid by the assignee of an executrix without the three years, were prescribed where the assignee was not contractor, but where she was contractor did not prescribe. No. 18. p. 61.

*Prescription.*

An assignation of a bond being challenged, the long prescription was pleaded; but it was found that the prescription of 40 years was not to be counted from the date of such assignation, but from the time of receiving the money thereon. No. 41. p. 178.

A base infeftment was taken by a son on dispositions from his father in 1653 and 1656; in 1680 the father, after the son's death, resigned the lands by a procuratory of resignation, and took new charters from the crown under which the lands were held, till 1735, without making up titles under the son's base infeftment; an objection of prescription to this base infeftment was repelled; and it was found that the lands being still in *hereditate jacente* of the son, a title to them could only be made up by a service to him. No. 129. p. 564.

An irritancy in a bond was not cut off by the lapse of 40 years, after an alleged homologation. No. 132. p. 590.

*Presumption.* A bond, on presumptions, held to be extinguished. No. 23. p. 84.

From circumstances of presumption, a person appointed factor by the father was made to count and reckon for property, which, with the factor's consent, had been conveyed by a weak elder brother to another person. No. 28. p. 105.

A person being sued in 1715 by the widow of one to whom, in 1697, he had granted a bond of pension, for the consideration of managing the grantor's law affairs; though the pension was never demanded by the grantee during his life, the bond was sustained and the money decerned for. No. 47. p. 209.

In 1691 a colonel gave his lieutenant-colonel a draft on his agent for 250*l.* and paid him 5*l.* in money, for which a receipt was granted; in a statement of all the officers' accounts in 1692, no notice was taken of the transaction of the preceding year, but the lieutenant-colonel acknowledged to have received 75*l.* 12*s.* 8*d.* of what was due to him, and he and the other officers assigned their claims to the colonel, to be solicited by him: in an action after the death of the parties in 1719, it was found that the draft for 250*l.* was not to be held to have been paid by the drawee, unless this was otherwise instructed; and that the 50*l.* paid by the colonel in 1691, was not to be held included in the 75*l.* 12*s.* 8*d.* acknowledged, in 1692, to have been received. No. 62. p. 282.

Children's provisions not claimed till after a forfeiture, and the lapse of several years after a locality might have been made effectual to pay them, were not presumed to have been paid. No. 80. p. 355.

A locality granted as a provision to an eldest son was held to be revoked by a deed of revocation found in the grantor's repositories after his death, though not published or recorded. No. 94. p. 417.

Bonds of pension granted to an advocate, (afterwards president of the Court of Session) during his continuance to be an advocate, were sued on after his death by his son as wholly remaining due, after the lapse of a good many years from their dates; and were sustained till the date of the grantee's becoming president of the Court of Session, his son, the pursuer, giving his oath of credulity on the debts acknowledged. Nos. 116, 117, 118. p. 514.

In a reduction of a mother's settlements, brought by her son and heir against a sister who was benefited by them on the ground that the sister had had access to the repositories of the deceased, and took what deeds she chose, and might have destroyed the rest; the sister having  
stated

*Presumption.*

stated in defence that the deeds were given to her by her mother, it was necessary for the pursuer to prove that the defender's intromission was unwarrantable. No. 126. p. 552.

The deeds produced were presumed to contain the last will of the deceased. *Ibid.*

A circumstantial proof brought by the pursuer, that the deceased had declared that she had made other settlements, and of embezzlement on the part of the defender was found insufficient. *Ibid.*

In a proving of the tenor, in regard the pursuer's counsel did not deny that the deed was in her hands cancelled, and refused to give their oaths of calumny thereon, the defender was absolved. No. 128. p. 561.

*See Provisions to Heirs and Children.* No. 94. p. 417.

*Tenor.* No. 128. p. 561.

— *Donatio non presumitur.* A disposition by a father to his son, followed by a saline which was not registered, made to preserve the estate from the penalties of a test act, might be warrantably cancelled. No. 2. p. 4.

By marriage-contract a wife was provided to the household furniture; the husband afterwards granted her a bond, and the liferent of a house was settled upon her; these did not fall under the maxim, but subsisted as separate and distinct rights. No. 18. p. 61.

Where a disposition had been made by a father to his son, followed with investment taken, but not recorded, nor clothed with possession, a daughter was intitled to take up the fee as heir to her father. No. 27. p. 99.

Marriage provisions presumed to be compensated by the grant and acceptance of a posterior provision. No. 80. p. 355.

Two deeds of mortification for educating children at a parish school were found in the grantor's repositories after his death; the one bore date four years after the other, but was in same terms with the first, with this alteration only, that a larger sum was mortified, and a greater number of boys to be educated: the Court having found that both subsisted as distinct deeds, the judgment was reversed. No. 84. p. 377.

The Court having also refused a proof by the instrumentary witnesses of the donor's intention, their judgment was reversed, and liberty given to examine the instrumentary witnesses. *Ibid.*

Decisions precisely similar given by the Court below, and Court of Appeal, in the case of two other deeds of mortification granted by the same party to King's College, Aberdeen. No. 89. p. 397.

*Prize.* A French privateer having captured a Scotch ship, took a quantity of goods out of her, and some money from the shipmaster, and upon payment of a ransom agreed upon, allowed the ship to depart with a ransom brief; the privateer having continued upon the coast, and being there captured by a British ship of war, the goods and money taken by force, as well as the ransom money, were to be restored by the captors. No. 32. p. 130.

*Process.* In a competition between two persons severally claiming to be heirs to an estate, the inquest refused to retour either of them. One of these parties called the other as a defender in an action of reduction and declarator; a third claimant then craved to be admitted as a defender in that action, stating himself to be in the same degree of propinquity with the other defender, which the pursuer acknowledged.

*Process.*

ledged. The Court having refused to admit this third party as a defender in that action, the judgment was reversed. No. 98. p. 436.

" In the reduction of a bond, bearing to be for money lent, on the ground of no onerous cause, the defender acknowledged that the consideration was the future transfer of South-Sea stock, and stated that such transfer was afterwards made accordingly to the pursuer's order. This quality in the condescendence did not prove against the pursuer. No. 112. p. 499.

In a process relative to the advance of a sum of money, the pursuer set forth the tenor of an obligation granted by himself to the defender's father, for a *depositum* made by the latter, and several letters as in the defender's hands; in terms of the act of sederunt, the defender was held as confessed on the tenor libelled, as he neither confessed nor denied the same. No. 131. p. 582.

See *Usury*. No. 115. p. 511.

— *Act and Commission*. A pursuer opposed the granting of an act and commission for examining the defender, a peer, in London, in a matter referred to his oath, on the ground that he being old and poor could not follow the examination; the commission was nevertheless granted. No. 88. p. 394.

— *Decree*. In a decree an alleged former decree having been founded on, as the ground thereof, and such decree not having been pronounced, the second decree was null. No. 85. p. 380.

— *Expenses of*. See *Costs of Appeal and Expenses of Process*.

— *Incident Diligence*. In mutual actions relative to the property of a common, several witnesses on both sides were examined upon an act and commission; and, after a second diligence, others, who had not before appeared, were also examined: one of the parties gave in a new list of witnesses, praying for a new act and commission, and to have some witnesses re-examined on commission, who had already deponed before the Court, but this was refused. No. 56. p. 259.

— *Lis finita*. After extracting a decree, with a reservation therein of several claims, the objection of *lis finita*, and that these points were not contained in the original summons, was sustained by the Court; but their judgment was reversed upon appeal, and it was found that the assignee of an executrix *might insist* for these claims. No. 11. p. 32.

Notwithstanding this reversal, it was found in a new action, that it was still competent to plead prescription to these claims. No. 18. p. 61.

*Promissory note*. It was objected to a promissory note granted in London, that it was not holograph nor signed before witnesses, and that therefore the signing and payment of the money ought to be proved; but the objections were repelled. No. 115. p. 511.

A partial payment was to be deducted, first out of the interest and afterwards out of the principal. *Ibid*.

*Proof*. Could the malversations of a public officer be proved *per singulares testes*? No. 8. p. 19.

A deed found to be fraudulently altered, upon ocular inspection of its different pieces, and a letter from one of the perpetrators of the fraud. No. 10. p. 28.

A debt held to be substantiated against a cautioner by the oath of the person for whom he was bound, in another cause. No. 42. p. 183.

Whether

*Proof.*

Whether holograph, or not being referred to the oath of the grantor of a bond, the term circumduced against him for not deponing. No. 47. p. 209.

The court having allowed a party to report a proof led in the same matter at issue, but in another cause, at the instance of another party against him, in which his present opponents *did compare*, the judgment was reversed. No. 67. p. 307.

A person sent money to London by another, to be by a third laid out in stock in the name of the person sending the money; this third person having died, the person sending the money received a letter from his son, informing him that the bearer of the money had laid out the same in stock in his own name, and gave the other his option to stand to the bargain or not; this letter was held to be proof of such option tendered. No. 99. p. 438.

In a reduction on the head of usury, the court having refused to examine a menial servant of the defender, who was a subscribing witness to the agreement alleged to be usurious, the judgment was reversed of consent. No. 107. p. 471.

The grantee in a bond having proposed to examine a cautioner therein as a witness with regard to the transaction for which the bond was granted, consenting that what he deposed to should not be of prejudice to him; the court refused to admit him, but the judgment was reversed of consent. *Ibid.*

In a *spuilzie* brought against the leader of a party on the king's side during the rebellion, persons belonging to that party were valid witnesses for the defender. No. 108. p. 477.

A foreign factor suing merchants in Scotland, alleging that his claim was known to and approved of by the shipmaster, having refused to refer this to the shipmaster's oath, a proof by witnesses was refused him. No. 123. p. 534.

See *Presumption*, No. 126. p. 552.

*Provisions to Heirs and Children.* A mother being put in possession of her eldest son's forfeited estate for aliment to younger children; in a question with the son after restoration of the estate, it was found that the mother's intromissions above the current interest of the children's portions, went in discharge of former interest and current interest, but not in payment of principal, or of future interest. No. 16. p. 55.

A portion being left to a daughter, with a proviso that she should not dispose of or encumber the same, or interest thereof, till the times of payment were elapsed; she might nevertheless assign the same in trust, to have an action carried on to recover the interest. No. 17. p. 59.

A special provision in a marriage-contract of sums of money to be laid out on land, or other good security, and also of conquest in lands, heritages, fishings, sums of money and others, to the *heirs* of the marriage, went to all the children, and not to the eldest son only. No. 90. p. 399.

A discharge of provisions granted by two of these children to their father, in consideration of a certain sum of money paid to them, operated in his favour with regard to the remainder of their provisions, and not in favour of another child who did not discharge. *Ibid.*

A father executed a deed in favour of his heir, giving him a locality over part of his estate, and assigning the tacks to him with warrandice from fact and deed, and a power of revocation *by writ under the*

T t

grantor's

*Provisions to Heirs and Children.*

*grantor's hand*: the first year the father marked the rents of the allocated lands in his rentals, as to be paid to his son; the next year this was not done, and the factor received a letter from the father to pay no more of the son's bills; the allocation was not thereby revoked; but a deed of revocation found in the grantor's repositories after his death, though not published, or recorded, revoked the allocation. No. 94. p. 417.

Certain creditors being preferred to a sum set apart for children's provisions, the creditors were ordained upon recovering payment, to convey their rights to the children, to enable them to operate relief on other subjects of the debtor. No. 136. p. 607.

See *Eisheat*, No. 136. p. 607.

*Husband and Wife*, No. 93. p. 411.

*Inhibition*, No. 15. p. 47.

*Legitim*, No. 133. p. 594.

*Presumption*, No. 80. p. 355.

*Publick Officer*. The office of conservator at Campvere, held by a grant under the great seal to a father and his son jointly, being, on complaint of the father's malversations, granted to a third person without declarator; this new grant was void. No. 8. p. 19.

A grant or patent of the office of king's printer in Scotland was made to a person and his heirs, and his partners, assignees, and substitutes; he afterwards assigned to two others each one-third of the patent: these assignees and the original grantee had each right to a third share in the grant of the office, equal in all respects, and each might use the title of one of his majesty's printers. No. 45. p. 197.

Certain objections made to one of the assignees, that the original grantee had not taken the oaths required by law within the time limited for that purpose, having assigned in the intermediate period;—that this grant was made during the subsistence of a former grant, though to commence after expiration of such former one;—and that it contained clauses and powers (some of which had been renounced) that were stated to be unusual and contrary to law; found not relevant to reduce the same. *Ibid.*

A new patent having been obtained during the currency of the former, without any reduction thereof, and having been founded on in this action, the decree was ordered to be extracted without prejudice to the grantees in the new patent, to insist on the gift in their favour as accords. *Ibid.*

The court having found that the partners in the first patent might print bibles, &c. and dispose of the same in any part of his majesty's united kingdom or elsewhere; upon appeal, these words were ordered to be omitted in the judgment of affirmance. *Ibid.*

*Qualified Oath*. An oath received, though objected to as containing qualities. No. 2. p. 4.

*Ranking and Sale*. Not relevant to reduce a decree of ranking, that posterior to the date of the decree the interests of certain creditors were produced, and ranked, and yet no new decree put up in the minute book. No. 22. p. 80.

A person who had purchased lands at a publick sale, at 20 years purchase of a proved rental, afterwards claimed deductions, 1st, Because the teinds were held by a tack from the college of Aberdeen, then near expired; 2d, because, as he alleged, the rent was too highly stated by one Chalder; 3d, because he was kept out of his purchase for



**Ranking and Sale.**

for six years, during which term the person in possession of it accounted for the rents which were less than the interest of the price. 4th. A deduction of certain expences he had been put to, in adjusting the debts due by the estate. In this case the purchaser had been employed as agent to conduct the sale. The court having refused these deductions, and allowed the sellers 30*l.* of expences. The judgment was affirmed. No. 34. p. 139.

**Recognition.** See *Forfeiture for Treason*, No. 72. p. 335.—No. 73. p. 337.

**Reduction.** In an action where various objections were made to the pursuer's title, the court having ordered production to be made, and afterwards granted certification; the judgment was reversed, and it was ordered, that the defenders should not take a term for production, until the pursuer had made out his title, upon which he founded his suit. No. 104. p. 459.

The defenders in a reduction improbation having objected to the pursuer's infestment, which was taken at the castle of Banff by dispensation in a charter of 1625, that by a posterior charter the castle was disjoined from the barony; the court found that objection not relevant to hinder the taking of terms for production, reserving this matter after production; but their judgment was reversed. No. 121. p. 525.

The defenders made another objection, that the pursuer claimed under a charter to heirs male, whereas a subsequent charter, as they offered to prove, had been granted to heirs general: the court gave the same judgment on this, as on the former objection; but their judgment was also reversed. *Ibid.*

And it was ordered, that in the further progress of the cause, the court should not oblige the appellants to take a term for production, until the pursuer made out his title, on which he founded his suit. *Ibid.*

**Registration.** A deed restricting an unlimited power of granting provisions to a second wife and younger children, which unlimited power was contained in infestments upon record, was found valid, though not registered, in a question between the heir and a second wife. No. 93. p. 411.

**Representation.** The heir male of a marriage, to whom an estate was provided by marriage-contract, being served *heres masculus et provisionis*, was found by the court liable to warrant his father's deeds; but the judgment was reversed. No. 15. p. 47.

A disposition was made by a person to one of his daughters, and the heirs of her body, whom failing to — his heirs and assignees; upon this disposition the daughter was infest, and dying without issue, her sister was served *tanquam legitima et propinquior heres* to the father and her; the service ought to have been as heir of provision. No. 44. p. 192.

The eldest son of a marriage was retoured *legitimus et propinquior heres* to his father *cum beneficio inventarii*. In the inventory he gave up not only the lands settled upon him in his mother's contract of marriage, but also certain other lands, and afterwards brought a reduction of the provisions in a second contract of marriage; alleging that he was served heir of provision, the narrative of the retour designing him heir procreated between a certain father and mother: it was

*Representation.*

found that he was served heir of line, and as such could not question any of his father's deeds. No. 50. p. 221.

*Sale.* By an agreement for the sale of an estate, the disposition was to be delivered by a day certain, and the price to be paid ten days afterwards; but the seller was not obliged to deliver the disposition till heritable security was granted for the price. No. 134. p. 601.

The estate being much encumbered, the creditors were preferred to the price upon assigning their debts with absolute warrandice.

*Ibid.*

*Safine.* The court having repelled an objection made to a safine written bookways, that the witnesses had only signed the last page, the judgment was reversed. No. 121. p. 525.

See *Registration*, No. 129. p. 564.

*Sequestration.* A sequestration granted of an estate, where a person was in possession by virtue of a tack granted by his father for payment of debts, by adjudications with expired legals, and by a disposition from an elder brother, which, though reduced for fraud and circumvention, was still to stand as a security for the onerous cause thereof. No. 28. p. 105.

A sequestration irregularly obtained set aside. No. 80. p. 355.

An estate of a person attained, which had reverted to a loyal superior, was sequestrated at the instance of competing creditors, adjudgers prior to the forfeiture. No. 122. p. 531.

*Service and Confirmation.* The Court of Session having refused to allow to the assignee of an executrix in a question with an heir served *cum beneficio*, the expences of an action before them, relative to the right of confirmation, between the executrix, and the father of such heir, the judgment was reversed. No. 11. p. 32.

The expences of confirmation, though not specially conveyed to this assignee, but paid by her, were found to exhaust the executry. No. 18. p. 61.

*Service of Heirs.* An estate having been disposed to a father, and failing him to his eldest son, and the heirs male of his body, with other substitutions; and the eldest son having survived the father was intert thereon, and died afterwards without serving heir to him; the court found that the right to the estate was not fully vested in the son without a service to his father, but the judgment was reversed. No. 111. p. 493.

*Society.* One partner disclaiming money due to the partnership, which in consequence of such disclamation was not paid, they had recourse against him. Nos. 3 & 4. p. 8.

The minutes of a meeting of a company, subscribed by the president, bore, that certain members sold to another their shares of the joint stock at a certain price; the person to whom the shares were so assigned, afterwards entered to the management of the whole concern, and applied the profits to his own use; it was found that he was obliged to pay to each partner the sums mentioned in said minute, though it was objected that the minute was crazed in some sentences; and that there was *locus penitentiae* till a more formal assignation was made. No. 54. p. 249.

The assignee was also ordered to free the other partners from the debts of the society, and pay them interest on the sums found due.

*Ibid.*

*Solidum*

**Solidum et pro rata.** A debtor granted bond with a cautioner, and afterwards a bond of corroboration with a different cautioner; the money was paid by the cautioner in the corroboration; but he had only relief against the cautioner in the original bond for one half of the sum paid. No. 105. p. 465.

**South Sea Company.**—*AB 7 G. 1. stat. 2.* An heritable bond was granted in consideration of transferring a sum of South Sea stock, *at the then next opening of the books*; by a separate obligation the grantee was entitled to transfer, at said opening or any time thereafter *on 3 days advertisement*; by said act of parliament, all contracts for the sale of stock, not performed by a certain day, were to be registered, or otherwise void; the stock was not transferred at the opening; the bond was registered in due time, but not the separate obligation: the court found that it was relevant to reduce the bond, that the transfer was not made in terms thereof; and the defence on the separate agreement was repelled, the same not having been registered in terms of the act: but by agreement of parties, the bond was restricted to a smaller sum, and the interlocutors reversed. No. 130. p. 577.

See *Mutual Contract*, No. 113. p. 503.

*Usury*, No. 107. p. 471.

**Spuilzie.** Certain persons who were present with the rebels, under the command of Lord Seaforth, when a spuilzie was committed, were liable conjunctly and severally *in solidum* for the damages committed by the said party. No. 96. p. 431.

The amount of these damages ascertained by the oaths of the pursuers. *Ibid.*

Interest allowed from the day after the rebels left the premises spuilzied. *Ibid.*

The court in a spuilzie brought against the leader of a party on the king's side during the rebellion, having found him liable in damages without hearing him on the relevancy; their judgment was reversed, and they were ordered to hear the defender on the relevancy. No. 108. p. 477.

**Stipend.** A parish being disjoined, the stipend formerly modified on the whole, was allocated on the original remaining parish, notwithstanding the use of payment had remained for 50 years, and the same after the disjunction as before. No. 24. p. 88.

It was not necessary to call the heritors of the new parish as parties. *Ibid.*

Though it was objected to, that the stipend was above the *maximum* of 1633. c. 19. it was allocated and decreed to be paid. *Ibid.*

**Succession.** A tutor in lieu of a personal bond payable to his pupil, having taken a heritable bond payable to the pupil and her issue, whom failing to three aunts her next of kin *nominatim*, and the survivor of them; the three aunts having survived the pupil, neither confirmed nor served themselves heirs, but one of them who survived the others assigned the heritable bond: in a question between the assignees, and the heir of the pupil, who was then also her nearest in kin, the assignation was established. No. 49. p. 216.

**Superior and Vassal.** The court having found that a superior was bound to enter an university having right to an adjudication, as his vassal, the judgment was reversed, and it was ordered that the superior should admit such proper person for vassal, as the university should nominate. No. 40. p. 172.

*Tailzie.* An heir of entail prohibited from alienating gratuitously, where the prohibitory, irritant, and resolute clauses were referred to as contained in another entail. No. 21. p. 76.

At making an entail the institute re-conveyed to his father an estate formerly settled upon him, and he and his wife discharged an obligation upon the father contained in their contract of marriage, the institute nevertheless could not gratuitously alter. *Ibid.*

It being found, that in respect an entail with prohibitory clauses, contained no irritancy of the right of the contravener, the debts of the heir in possession did equally affect the estate with the debts of his authors; the judgment was reversed. No. 29. p. 110.

An entail executed prior to the act 1685 sustained, though objection made that it was not registered in terms of that act. *Ibid.*

A father inserted in an estate in life-rent, and a son inserted in fee, jointly entailed the estate in the son's contract of marriage, with prohibitory, irritant, and resolute clauses, and with power to the father and son jointly to alter; the entail was insert in the register of tailzies upon the joint supplication of the father and son, but no resignation was made, nor infestment taken thereon: the irritancies and clauses not to alter were binding upon the son after the father's death, even supposing the substitution were gratuitous. No. 46. p. 203.

A son received right to an estate from his father, and the son afterwards executed a procuratory of resignation for an entail of the estate, with prohibitory, irritant, and resolute clauses to himself in life-rent and to his father in fee, and failing of him to the heirs male to be procreated of his own body, and failing of them to other heirs of entail: this procuratory was recorded in the register of tailzies, and inhibition used against the grantor, but no charter or sasine taken thereon: it was found that there being no antecedent onerous cause for making this entail especially in favour of heirs to be begotten and born, and seeing it remained in the terms of a personal right, without being perfected by charter or sasine, it was revocable by the maker thereof with consent of his father the first institute. No. 51. p. 226.

A father executed an entail in favour of his son; the son incurred an irritancy in favour of the father for not relieving him from debts within a certain period; but before declarator was attained of treason: the court found that the estate returned to the father, though there was no declarator of the irritancy, and that the irritancy was not purgeable. Upon appeal the judgment was found null, *the court having no jurisdiction.* No. 65. p. 298.

A tailzie executed in 1716, not recorded in the register of tailzies, sustained in 1725, as a title whereon to serve heir of provision. No. 129. p. 564.

*Teinds.* Prorogations of tacks of teinds, where an augmentation of stipend was small, reduced from six 19 years, to one 19 years. No. 7. p. 16.

Grounds sufficient on which to reduce a decree of erection of a new parish. No. 19. p. 67.

The reasons of reduction ought to have been advised before ordering a new proof and perambulation. *Ibid.*

An action of valuation being suffered to fall asleep, the minister let a tack of certain teinds to the magistrates of a royal burgh, and the action being awakened, these magistrates ought to have been called as parties. No. 26. p. 96.

A decree

**Tends.**

A decree of valuation, obtained on a mistake as to the rental, set aside, and the mistake rectified. No. 26. p. 96.

**Tenor.** The tenor of a lost deed of remuneration to a wife over certain lands, for part of her jointure secured upon other lands renounced by her, found to be proved, by an instrument of sasine, a deed in which the remuneratory deed was recited, and a slender proof by witnesses. No. 43. p. 187.

It was not necessary to prove the *casus omisionis* in this case. *Ibid.*

The defender having claimed a proof that the pursuer, his mother, in his minority had intromission with all his father's writings, the same was refused. *Ibid.*

The court having reduced a decree of proving the tenor of a bond in 1698, and a decree of adjudication on the bond prior, and decree of mails and duties subsequent to the proving of the tenor, for the reason that it had not been proved who were the writer and witnesses; their judgment was reversed, and the reasons of reduction repelled. No. 48. p. 211.

In an action by a mother against her son for proving the tenor of a deed executed by her in her husband's lifetime, the pursuer having the disposition in her own hands cancelled, and having never ratified the same judicially, it was presumed to have been cancelled by herself, and she was not allowed to prove the tenor thereof. No. 128. p. 561.

**Testament.** A testament executed *in extremis* reduced, where the testator's hand was supported, and assisted, in writing the latter part of his name. No. 9. p. 26.

**Thirlage.** See *Forfeiture for Treason*, No. 59. p. 274.

**Treason.** Obligations granted by a person in prison before trial The Earl of Winton, while in prison, previous to his trial and attainder for high treason, granted receipts bearing to be for money advanced to him, but these were not allowed in whole. No. 119. p. 518.

It was found, however, that he was entitled to be alimented out of his estate at that period, and to apply money to the expences of his trial and for his maintenance in prison for 3 months; and for such expences the sum of 2972*l.* 3*s.* was modified. *Ibid.*

See *Forfeiture for Treason passim*.

**Treasury and Exchequer.** Appeal from a judgment of the commissioners of. No. 3. p. 8.

**Trust.** A second son having accepted from his father a tack of the family estate for payment of debts, and having afterwards obtained from his elder brother a disposition of that estate; in an action at the instance of the son of this elder brother, (whom the court had found to have been served *beir male*) the trustee was obliged to count and clear the onerous cause of said disposition. No. 15. p. 47.

A discharge granted by an executrix to a manager for her under a will, who had a salary, of all his receipts and intromissions, was not sufficient to discharge him from the intromission with a bond, which the deceased had disposed to his widow and executrix, for the good of his grandchildren. No. 41. p. 178.

Though the assignation of the bond bore to be for an onerous cause, in the circumstances of the parties, as executrix and trustee, it was held in a question near 50 years from the date of this assignation, that it did not prove the onerous cause thereof. *Ibid.*

*Trust.*

Circumstances inferring the trust of a disposition bearing to be heritable and irredeemable, and upon which investment had followed. No. 52. p. 234.

The trust being declared, the trustee was ordered to continue in possession till it was redeemed, or proved that the debt was paid. *Ibid.*

After several interlocutors holding the appellant as confessed for not deponing, the appeal was brought that he might be reponed to his oath; but the interlocutors were affirmed. *Ibid.*

An estate held in trust for a papist was forfeited by his attainder for treason, and could not be taken up by the protestant heir. No. 57. p. 263.

The attainted vassals of the trustee of an attainted papist did not forfeit their estates to the protestant heir, who claimed them as a loyal superior under 1 G. 1. c. 20. but to the crown. No. 61. p. 280.

A person who had conveyed his feu to his superior's son, having contended that the conveyance was deposited with a trustee, till certain conditions were fulfilled; after obtaining the oath of the superior, was also allowed the oath of his son, the dispoinee. No. 63. p. 287.

In a subsequent appeal on the same subject, the son having deposed that he personally gave no consideration for the deed, and that it was not delivered to him, but that every thing was transacted by his father, and that he never heard of any conditions or trust; it was found that the depositions did not support the allegations of trust. No. 88. p. 394.

Certain alleged qualifications of trust found to be irrelevant. No. 97. p. 435.

Trustees chosen by creditors, who had a salary for their trouble, having thrown the debtor into prison on a caption, but afterwards liberated him without applying to the creditors for their consent; the debt being afterwards lost, it was relevant to make these trustees liable to the debt, that they consented to the debtor's liberation. No. 103. p. 457.

The creditors of a trustee could not affect the trust estate. No. 136. p. 607.

*Tutor and Pupil.* Acceptance of the office of tutory found not proved by tutorial inventories, which were not judicially signed, and wanted writer's name and witnesses, unless posterior acts of administration were proved: nor by a missive letter not holograph, consenting to lend the pupil's money. No. 33. p. 134.

Certain acts of administration found not sufficient to infer the acceptance of the office. *Ibid.*

A tutor having taken a heritable bond, in corroboration of a personal one, payable to the pupil and her issue, whom failing to three aunts, her next in kin, *nominatim*, it was found that he acted wantonly. No. 49. p. 216.

Lord Saltoun having left 4000*l.*, payable at the first term after his decease to the eldest son of the master of Saltoun, and failing him to the grantor's heirs of entail; and having appointed an uncle of the pupil to be his tutor and curator, with a salary during non-age, with power to uplift the principal and interest, to employ the money in the purchase

*Tutor and Pupil.*

purchase of lands, &c.; the pupil's father, the heir and executor of the grantor of the provision, was not obliged to pay over the money to the uncle without security: but to pay it to the Court of Session, who were ordered to lay it out in the manner directed by the grant.

No. 68. p. 312

*Vis et Metus.* During the dependance of a declarator of trust, the trustee having arrested the pursuer, and while under caption having taken from him a discharge and renunciation of all trust, and of the action of reduction; this discharge was reduced upon the head of *vis et metus*; and the defender was ordered to pay 6*l.* Scots of expences, before he could be further heard in the principal cause. No. 52. p. 234.

A disposition was granted by a woman to her heir at law, reserving her own life-rent and the courtesy of a future husband, and declaring that it should not affect the heirs of her own body; and was followed by a more formal disposition a few days afterwards, on which infeftment followed: she brought an action for reduction on the ground that being under arrest in London, at the suit of a creditor, her heir the disponee had refused to bail her, unless she executed the deed first mentioned; and that the bailiff threatening to carry her to Newgate, she gave her consent, and executed this deed after bail was granted, but before she left the bailiff's house: the court reduced the deed, and all that followed thereon; but their judgment was reversed. No. 86. p. 387.

*Union.* See *Reduction*, No. 121. p. 525.

*Usury.* During the rapid rise of South-Sea stock an agreement was entered into on a Sunday, to sell a certain quantity of stock, at 90 *per cent.* above the price of the preceding day, the price not to be payable till a year after transfer of the stock; and an heritable bond was afterwards granted in consequence of the transfer for payment of the agreed price on a day certain: this bond being reduced on the head of usury, the judgment was reversed of consent. No. 107. p. 471.

A defender having alleged usury against a promissory note granted to the pursuer, the pursuer, a goldsmith or banker, residing in London, was ordered to confess or deny the facts, and a commission was granted to Lord Chief Justice King to take extracts from his books. No. 115. p. 511.

In a loan of money negotiated by drawing on a foreign merchant, and re-drawing on London, the borrower agreed to pay exchange and re-exchange; though this amounted to more than legal interest, it was not usury. No. 131. p. 582.

*Writ.* An objection made to a receipt, that it was void, being neither holograph, nor having the solemnities required by the acts of parliament relative to the testing of writings, was not sustained. No. 62. p. 282.

Was a deed written and executed at Dublin, which bore to be written "by Edward Dudgeon, Gentleman," valid? *Ibid.*

A deletion, and a marginal note signed by the grantor, neither of which were noticed in the testing clause, having been held to be null, the judgment was reversed. No. 81. p. 364.

The writer of a bond was thus designed, "Patrick, Gordon, servant to Mr. Alexander Dunbar;" the Court of Session found  
this

*Writ.*

this a nullity. This was brought before the Court of Appeal, but was not decided, the appeal being decided upon a ground superseding that question between the parties. No. 83. p. 372.

A bond reduced as vitiated, where after the sum, the word "pounds" was written upon an erasure, and the penalty was in merks *offering* to a fifth part of the principal, if it had been merks, but not if pounds, as it stood in the bond claimed on. This bond had been allowed, as it stood, for a compensation in an action between the father of the persons claiming on it and a third party, upwards of 30 years before, but was not then produced. No. 110. p. 488.

An objection of rasure in *substantialibus* repelled. No. 124. p. 539.



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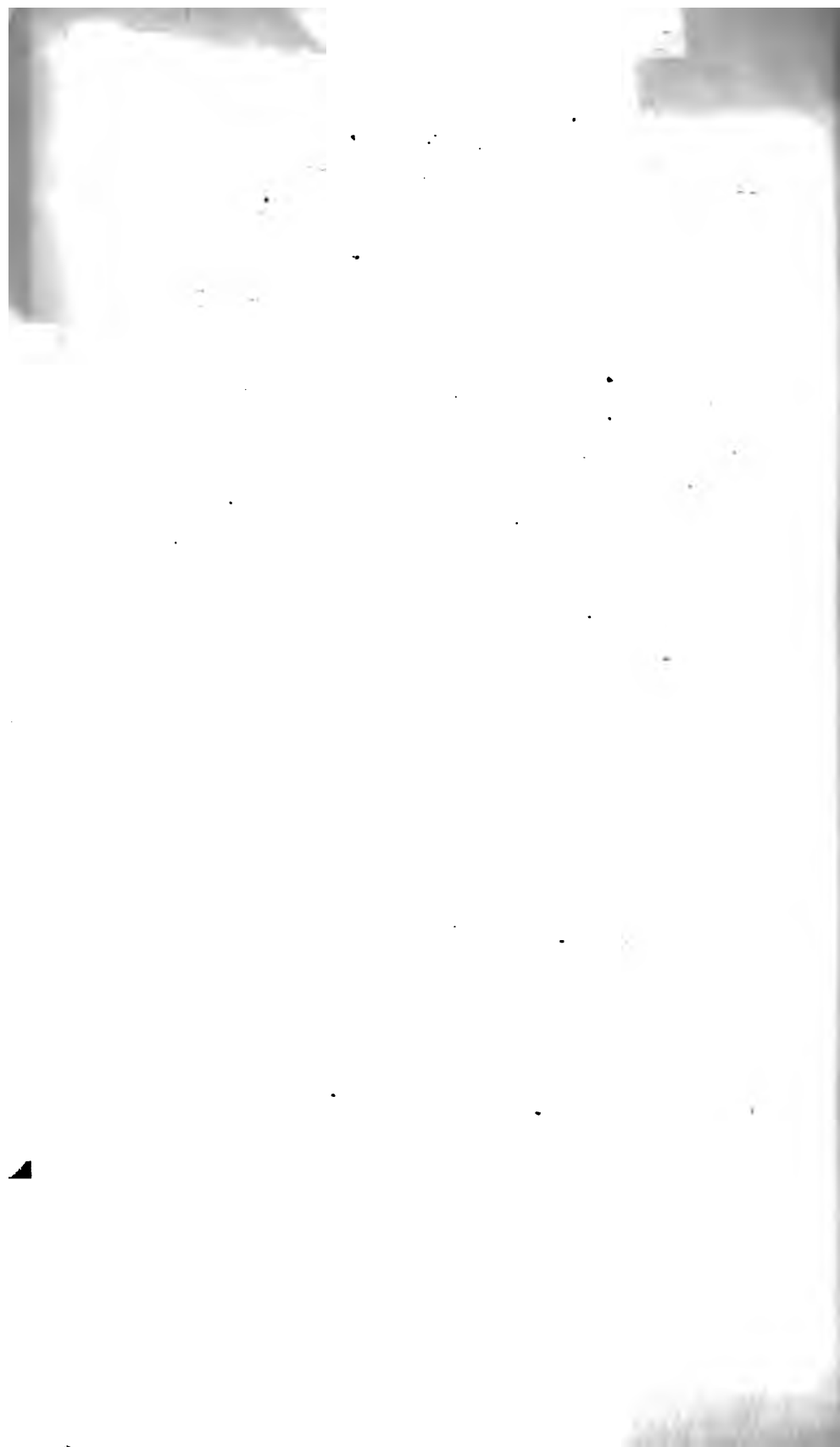
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